

Environmental Symposium

**(U.S. DEPARTMENT OF THE NAVY
DAVID TAYLOR RESEARCH CENTER**

in cooperation with

National Steel and Shipbuilding Company
San Diego, California

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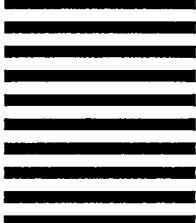


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NATIONAL SHIPBUILDING RESEARCH PROGRAM



E N V I R O N M E N T A L S Y M P O S I U M

M A Y 5 - 6 , 1 9 9 2

Presented by
Collier, Shannon & Scott

Task N1-91-3

AGENDA
NATIONAL SHIPBUILDING RESEARCH PROGRAM
ENVIRONMENTAL SYMPOSIUM

May 5-6, 1992
Stouffer Concourse Hotel
Crystal City, Virginia

May 5, 1992

I.	Welcome and Introduction	8:00 - 8:15
II.	Why Conduct An Environmental Audit? (overview) (John L. Wittenbom, Partner Collier, Shannon & Scott)	8:15 - 8:45
	What is an environmental audit	
	Types of audits	
	Advantages and disadvantages of audits	
III.	Scope of Environmental Liability (Robin A. Fastenau, Attorney, Collier, Shannon & Scott)	8:45 - 9:30
	- Proliferating environmental requirements	
	- Increasing environmental sanctions	
	- Increased emphasis on enforcement	
	+ Civil vs. criminal	
	+ Standard of liability	
	BREAK	9:30 - 9:45
IV.	Developing and Implementing an Audit Program (John L. Wittenbom) (Robin A. Fustenau) (Andrea B. Wenderoth, Attorney, Collier, Shannon & Scott)	9:45 - 11:15
	Keys to an effective audit program	
	How to prepare for and conduct the audit	
	Managing environmental audit information	
	What to report and when to report	
	Documenting audit results	
	Developing an action plan	

V.	DOJ/EPA Policy On Audits and Enforcement (Barry M. Hartman, Acting Assistant Attorney General General Environmental & National Resources Division US. Department of Justice)	11:15 - 12:00
	WORKING LUNCH - Questions and Answers and General Discussion	12:00 - 1:00
VI.	Auditing Shipyards -- the Navy experience (CW02 Mark Purvis, NAVSEA 07 I&E)	1:00 - 1:30
VII.	Conducting a Shipyard Audit Review of Clean Air Checklist Review of Asbestos Checklist Review of Clean Water Checklist Review of Hazardous Waste Checklist (Carolyn O. Tillman, Attorney, Collier Shannon & Scott)	1:30 - 4:15
	BREAK Review of requirements for tanks (Steve Kourtis, Attorney, Collier, Shannon & Scott) Review of Emergency Planning and Community Right-to-Know requirements Review of TSCA and FIFRA checklists Minimizing liability for property transfer Auditing transporters Auditing treatment, storage and disposal facilities	2:45 - 3:00
	QUESTIONS AND ANSWERS	4:30 - 5:00

May 6, 1992

VIII.	Environmental Bulletin Board (John L. Wittenborn)	8:00 - 8:30
IX	Developing Environmental Issues for shipyards Clean Air Act (William M. Guerry, Attorney, Collier, Shannon & Scott) Permits Control Techniques Guidelines Clean Water Act Toxic sediments Wetlands Pollution Prevention Reauthorization SARA Section 313 reporting	8:30 - 10:00
	BREAK	1 0 0 0 - 1 0 : 1
x.	Continued - Developing Environmental Issues for Shipyards RCRA Reauthorization Mixture and Derived-from Rules (Jeffrey L. Leiter, Partner Collier, Shannon & Scott) Used Oil Underground Storage Tanks	1 0 : 1 5 - 1 1 : 1 5
XL	Developing a Corporate Environmental Compliance Program for Shipyards (John L. Wittenborn)	11:15 - 12:00
	WRAP-UP AND ADJOURNMENT	1 2 : 0 0 - 1 2 : 3 0

**NATIONAL SHIPBUILDING RESEARCH PROGRAM
ENVIRONMENTAL SYMPOSIUM**

May 5-6 1992
Stouffer concourse Hotel
Crystal City, Virginia

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2) Mike Ludwig	IPEC (Atlantic Coast Equipment)
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4) John Signotte	IPEC
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26) Capt. L. J. Olson	USCG Yard-Curtis Bay

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32) Harry Suit	USCG-Curtis Bay
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36) Oren L. Funkhouser	Bath Iron Works Corp.
37) Bob Bellonzi	Bath Iron Works Corp.
38) Paul H. Fenton	Bath Iron Works Corp.
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42) Gene Aspuru	Avondale Industries
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44) Hugh O'Neill	General Ship Corp.
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79) John Tock	NAVSEA
80) Barry Hartman	DOJ
81) John Williams	David Taylor Naval Research Center
82) John Wittenborn	c s & s
83) Robin A. Fastenau	c s & s
84) Andrea B. Wenderoth	c s & s
85) Carolyn O. Tillman	c s & s
86) Steve Kourtis	c s & s
87) William M. Guerry	c s & s
88) Jeffrey L. Leiter	c s & s

SECTION II
WHY CONDUCT AN ENVIRONMENTAL AUDIT?
(OVERVIEW)

II.. WHY CONDUCT AN ENVIRONMENTAL AUDIT? (Overview)

John L. Wittenborn

A. What Is An Environmental Audit?

A systematic documented method of assessing environmental compliance:

- gathers information concerning company operations and compares it to legal requirements
- involves site visits, descriptions of operations, review of documents and interviews with persons responsible for environmental compliance
 - determines whether there are existing or potential violations
 - may cover past as well as current practices

B. Types Of Audits

- 1) Regulatory Compliance
 - a) Facility-wide vs. Company-wide
 - b) “One time” v. Periodic
 - c) Confidential v. Non-confidential
- 2) Property transfer
- 3) Risk Assessment
- 4) Management Effectiveness

c. Advantages And Disadvantages Of An Audit

Advantages

- 1) Avoid civil and criminal liability
 - a. Civil liability is “no fault.” Need to find and fix. Compliance reviews will lessen the potential for and size of fines.

- 1) Ensure that regulatory deadlines are met.
- 2) Ensure that documentation (permits, etc.) are current.

b. Internal flagging of problems or potential problems enable management to correct them before they become serious and costly to remedy (hopefully, before they are publicized.)

- 2) Management Protection
 - a. Audit can be used to:
 - i. refute allegations of corporate officers' negligence in discharging their duties under the environmental laws.
 - ii. refute liability for acts of lower employees.
 - iii. familiarize the corporate officer responsible for signing certifications and permits with the information relevant and necessary to insulate himself/herself from possible criminal liability.
 - iv. ensure that a clear and workable procedure is established for satisfying reporting requirements.
 - b. Audit may reveal the need for restructuring environmental management will indicate if there are clear lines of responsibility and communication among the management team for environmental matters.
- 3) Influencing Regulatory Actions
 - a. Audit enables company to participate in the rulemaking process to influence future regulation the company's position would be supported by concrete data and reasoned analysis.
- 4) Cost Savings
 - a. Early discovery of compliance problems may avoid imposition of penalties or payment of damages.
 - b. Discovery of need for modifications to pollution control equipment and/or treatment processes may save operating expenses.
 - c. Audit enables company to:

- i. better manage risks and possibly lower insurance costs, and
 - ii. more accurately project future compliance costs.
- 5) Corporate Response Plan
 - a. Audit will identify those situations where emergencies might occur and enable company to prepare a plan for responding to potential crises.
- 6) Planning for Change or Growth
 - a. Audit establishes ongoing database for corporate decisionmaking regarding
 - (i) new facilities or expansion
 - (ii) new products or services
 - (iii) waste management (permits, etc.)
 - b. Audit provides information for a potential buyer if sale of a facility is contemplated.
- 7) Litigation Support
 - a. Audit can be used:
 - i. to provide valuable data in any pending or prospective environmental litigation.
 - ii. in negotiations with an administrative agency over compliance issues.
- 8) Public Relations
 - a. Company which conducts periodic audits will be perceived as environmentally responsible.
 - b. May lower regulatory scrutiny.
- 9) Employee/Management Awareness
 - a. Promote visibility of environmental programs and people, aid in budget and staff issues.
 - b. Improve overall environmental ethic.

Disadvantages

- 1) Potential for imposition of criminal liability on company and/or individuals if noncompliance discovered but not corrected.
- 2) No guarantee that audit data will not be used against the company
 - a. Audit data provides a "road map" for regulatory authorities and private parties to sue the company if the information is not protected from disclosure.

SECTION III

SCOPE OF ENVIRONMENTAL LIABILITY

SCOPE OF ENVIRONMENTAL LIABILITY

Robin A Fastenau
Collier, Shannon & Scott

Number and extent of environmental statutes and regulations has increased dramatically in the last 25 years. In 1965 there were three statutes governing use and control of chemicals in the U.S., by 1985 there were 16. In 1972 there was less than 1000 pages of environmental regulation in Title 40 of the Code of Federal Regulations, by 1988 there were 9800 pages. In terms of overall regulation of the environment, there are 23 statutes that provide for the protection of the environment, all but two of these contain criminal as well as civil penalties. This enforcement discussion will focus on the major environmental statutes, administrative and judicial enforcement and private party litigation arising from these statutes.

I Summary of Civil Liability Under Federal Statutes

1. CERCLA Section 107(a), 42 U.S.C. 59607 makes a company liable for the costs of cleaning up the release of any hazardous substances if the company is a "potentially responsible party as defined by the statute. A PRP is defined as the current or former owner or operator of the facility when hazardous substances were released or any company that arranged for the treatment or disposal of hazardous substances at a facility born which there is a release, or any company that arranged with a transporter for the transport for treatment or disposal of a hazardous substance from which there is a release.

retroactivity
government or private party

2. RCRA Section 3008(g), 42 U.S.C. § 6928(g), creates liability for any person who violates any requirement of the statute such as permitting or recordkeeping and establishes a civil penalty not to exceed \$25,000 per day for each violation. RCRA is the cradle to grave tracking system for hazardous waste and requires generators, transporters and treatment storage and disposal facilities to adopt certain standards for use and storage of materials on-site and proper handling procedures for transportation

treatment, storage and disposal of hazardous waste. RCRA also requires that appropriate manifests and records be kept regarding these procedures.

Section 7003(a), 42 U.S.C. 6973(a) of RCRA also provides that any person who has contributed or is contributing to handling, storage or treatment or disposal of any solid or hazardous waste that may present an imminent and substantial endangerment to health or the environment may be ordered to clean up the problem

3. **Clean Water Act** Section 309(g), 33 UOS.C. § 1319(g) authorizes the government to issue an order requiring compliance or bring a civil action against the company whenever any person is in violation of any condition or limitation of CWA or a state issued permit EPA. Administrative penalties may be assessed up to \$125,000, however if a civil action is brought then the fine is \$25,000 per day per violation

Section 505 of CWA permits any citizen to bring a civil action against any person who is in violation of an effluent standard or limitation or other order issued by the government where a state or federal agency has not commenced or is not diligently prosecuting a civil or criminal action. ..

4. **Clean Air Act** Section 120, 42 U.S.C. § 7420 authorizes EPA to assess and collect administrative noncompliance penalties against persons in violation of applicable implementation plans or other provisions of the Act. Penalties of \$25,000 per day up to \$200,000 and activity must have occurred within last 12 months. Otherwise, EPA may pursue civil penalties pursuant to section 113(b) against the owner/operator of an affected source, a major emitting facility or a major stationary source; wherein such person is in violation of an application implementation plan or permit or violates other specific provisions of the Act.
5. **SARA Title III** 42 U.S.C. 11025 enacted the Emergency Planning and Community Right-to-Know Act which requires the development of comprehensive local emergency response plans to be followed in the event of an emergency chemical release and imposes chemical reporting requirements for facilities that are required to prepare MSDS for hazardous chemicals under OSHA Section 325 of EPCM authorizes administrative penalties of up to \$25,000 per violation and civil penalties of \$25,000 per day of vioiation, for failure to comply with notification and reporting requirement.

In general in calculating penalties under the environmental statutes, courts can consider the following:

seriousness of violation
the economic benefit resulting from the violation

- history of violations
- good faith efforts to comply with the applicable requirements, and
- the economic impact of the penalty on the violator.

II. Personal Liability for Civil Violations

A. Direct Liability

1. Control

United States v. Motollo, 629 F. Supp. 56 (D.N.H. 1984)
Day to day control, personal participation in waste management

2. Capacity to Control

United States v. Northeastern Pharmaceutical & Chemical Co., 810 F. 2d 726 (8th Cir. 1986), cert. denied, 108 S. Ct. 146 (1987). Corporate officer actively participated in management of waste disposal, a second officer held liable for "contributing to disposal of hazardous substance" even though halfway across the county because as a officer he had the capacity to control the disposal of hazardous waste.

3. Prevention Test

Michigan v. ARCO Industries Corp., 723 F. Supp. 1214 (W.D. Mich. 1989).

Consider evidence of authority to control waste handling, responsibility actually taken for waste disposal and positive efforts of person to avoid or abate the problem.

B. Indirect Liability

Piercing the Corporate Veil
United States v. Nicolet, 712 F. Supp. 1193 (E.D. Pa. 1989).

III. Criminal Liability

A. Criminal Penalties

1. Penalties for Knowing or Willful Violations

Major environmental statutes all have provisions authorizing criminal penalties for knowing or willful violation of the statutes. The actions

are of two types: 1) a violation of requirement order or prohibition, such as discharging without or in violation of a permit; or 2) falsifying records, improper certifications or failure to file appropriate forms.

Examples:

RCRA - any person who "knowingly transports" any hazardous waste without an applicable permit may be criminally fined not more than \$50,000 for each day of violation and imprisoned not more than 5 years. Section 3008(d), 42 U.S.C. § 6928(d).

SARA - any person who knowingly and willfully fails to provide emergency release notification shall be fined not more than \$25,000 or imprisoned for not more than 2 years, or both. For a second or subsequent conviction the penalty shall be a fine of not more than \$50,000 and imprisonment of not more than 5 years, or both. 42 U.S.C. § 11025.

CERCLA - any person who fails to notify the government as soon as he has knowledge of a release of a hazardous substance, other than a federally permitted release, in a quantity equal to or greater than that determined pursuant to section 102 shall be fined in accordance with Title 18 of the U.S.C. or imprisoned for not more than 3 years (or not more than 5 years for a second offence) or both. Section 103(b), 42 U.S.C. § 9603(b).

CWA - any person who knowingly violates act or permit condition shall be punished by a fine of not less than \$5,000 nor more than \$50,000 per day of violation or by imprisonment for not more than 3 years or both. If a second conviction, the fine shall not be more than \$100,000 per day of violation or by imprisonment of not more than 6 years, or both. Section 309(c), 33 U.S.C. § 1319(c).

CWA - any person who knowingly places another person in imminent danger of death or serious bodily injury, shall be subject to a fine of not more than \$250,000 or imprisonment of not more than 15 years, or both. An organization shall be subject to a fine of not more than \$1,000,000. Section 309(c), 33 U.S.C. § 1319(C).

CAA - any person who knowingly violates any requirement of an applicable implementation plan requirements relating to new source performance standards or permitting or reporting requirement shall be liable for payment of a fine pursuant to Title 18 U.S.C or by

imprisonment of up to 5 years, or both. Section 113(c), 42 U.S.C. § 7413(C).

CAA - any person who knowingly releases a hazardous pollutant or extremely hazardous substance under SARA and places a person in imminent danger of death or serious bodily injury shall be subject to fines pursuant to Title 18 615C or by imprisonment for not more than 5 years, or both. Section 113 (c), 42 U.S.C. \$ 7413(c).

CWA - any person who knowingly makes any false material statement in any application record or other documents filed or required to be maintained under this act shall be punished by a fine of not more than \$10,000 or by imprisonment for not more than 2 years, or both Section 309, 33 U.S.C. 5 1319(c).

RCRA - any person who knowingly omits material information or makes any false material statement or representation on any application record or other document filed maintained or used for purposes of compliance shall be subject to a fine of not more than \$50,000 for each" day of violation or_ imprisonment not to exceed 2 years, or both.

2 . Penalties for Negligent Violation

CAA - any person to negligently release into the environment any hazardous air pollutant or any extremely hazardous substance listed under SARA and at the time negligently place another person in imminent danger of death or serious bodily injury shall be fined pursuant to Title 18 05.c. or by imprisonment for not more than 1 year. Section 113(c), 42 U.S.C. S 7413(c).

CWA - any person who negligently violates provision of act or negligently introduces any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage shall be punished by a fine of not less than \$2,500 nor more than \$25,000 per day of violation or by imprisonment for not more than 1 year. Section 309(c), 33 U.S.C. 5 1319(C).

B. Case Examples of Criminal Liability

U.S. v. Hoeflin, 880 F. 2d 1033 19th Cir. 1985) corporations are presumed to have knowledge of the statutory requirements of the environmental laws, and the knowledge of a defendant as to whether a company has a permit for a particular discharge will not be a defense to liability.

U.S. v. Hayes Int'l, 786 F. 2d 1499 (11th Cir. 1986) owner of an airplane refurbishing plant which generated hazardous waste was liable for the improper disposal of its waste because the hauler employed by Hayes did not have a permit to dispose of the waste and failed to properly dispose of it. Defendant acted "knowingly" when willfully failed to determine the permit status of a facility and that knowledge of the absence of a permit could have been inferred from circumstantial evidence such as the recycler's. willingness to dispose of the waste at an unusually low price.

U.S. v. Carr, 880 F. 2d 1550 (2d Cir. 1989), supervisor of maintenance at an army camp was "in charge of facility" such that he could be held criminally liable for the failure to report a release of a prohibited amount of a hazardous substance under Section 103 of CERCLA Carr was a maintenance supervisor that directed a work crew to dispose of waste and paint in an improper manner and failed to report the release. The decision is important because it shows a willingness on the part of courts to expand individual liability beyond the officers and directors of the organization to include lower-level supervisors.

The CAA Amendments specifically addressed this issue by defining "person" in the criminal context "to include any person who is a stationary engineer or technician responsible for the operation maintenance, repair or monitoring of equipment or facilities and who often has supervisory and training duties but who is not senior management personnel or a corporate officer."

U.S. v Protex Industres, 874 F.2d 741 (4th Cir. 1990), court held that in the context of public welfare offenses, "knowingly" requires only that one act voluntarily, with knowledge of one's actions, it does not require knowledge of the law or a specific intent to break the law.

U.S. v. Dee court permitted a set of jury instructions that allowed the jury to infer willful blindness and therefore establish the requisite degree of knowledge on the part of corporate officials based solely on their respective positions of responsibility in an organization

c. **Government Contracts**

Pursuant to Section 306(a) of the Clean Air Act and Section 508 of the Clean Water Act no Federal agency may enter into any contract with any person, who has been convicted of any criminal offense under these acts, for the procurement of goods, materials, and services if such contract is to be performed at any facility at which the violation which gave rise to such

conviction occurred, and if such facility is owned, leased, or supervised by such person

Effects of auditing on delisting

D. Enforcement by Department of Justice

The number of federal investigators is increasing, EPA has 53 full time investigators devoted to crime, Environmental Crimes Section at Environment and Natural Resources Division of DOJ now has 25 attorneys. Pollution Prosecution Act of 1991 increased the number of criminal investigators to 200 by fiscal year 1995. One hundred fifty of the FBI's agents now have at least one environmental criminal case on their investigative agendas.

DOJ Statistics on Enforcement of Environmental Crimes

E. Federal Guidelines

Federal environmental offenses are subject to sentencing under the United States Sentencing Guidelines as are all federal crimes. Sentencing guidelines for individuals became effective on November 1, 1987. The U.S. Sentencing Commission prepared sentencing guidelines for organizations which became effective November 1, 1991. These guidelines are expressly not applicable to environmental offenses committed by organizations.

Section 2Q1.2 assigns a base offense level of 8 for violations involving hazardous and toxic substances; section 2Q1.3 assigns a base offense level of 6 for violations involving non-hazardous, non-toxic substances. Each guideline contains a specific offense characteristic that

raises the base level if the offense was a single or continuous violation or if there was a substantial likelihood of death or serious bodily injury. A typical RCRA or CWA criminal violation can result in an offense level of 14-18 discharge of a hazardous substance Without or in violation of a permit. Based on the sentencing table, a person can receive a sentence of 15-21 months for offense level 14 and 27-33 months for offense level 18, if the defendant has no prior criminal history. The offense levels are subject to upward adjustment depending on the defendant's role in the offense, the presence of obstruction of justice, the use of special skill in commission of the crime. Downward adjustments in offense levels can be made for acceptance of responsibility through a guilty plea or substantial cooperation with the prosecution.

IV. Recent Decisions Imposing Civil and Criminal Liability

Wheeling Pittsburgh- \$6.1 million CWA Fine imposed even though most of the violations occurred while the company was undergoing bankruptcy. Company was also required by the consent decree to improve its compliance program

Pfizer -\$3.1 million CWA violations

United Technologies - \$3 million criminal fine for hazardous waste violations where cleaning solvents were spilled and swept outside the building and an in-house environmental compliance person was aware of the problem

Texas Eastern Corp. -\$18.6 million penalties to Pennsylvania's and an agreement to conduct a \$200 million cleanup of PCBS.

Alcoa - \$7.5 million in criminal and civil penalties to New York state for hazardous waste violations. 3.5 million was criminal penalty for unauthorized possession of hazardous waste, unlawful manifesting shipment of hazardous waste, unlawful disposal of hazardous waste and endangering the environment.

General Metal Fabricators - production manager of electroplating plant sentenced to 40 months imprisonment and 2 years probation for illegally storing and

disposing of the plant's waste in a pit behind the plant and for discharging hazardous waste into an unlined lagoon on the property.

Interstate Lead Company - \$4.3 million to state and federal government for violations CWA and RCRA as a result of lead-battery recycling operations.

Vista Paint Corp. - \$3 million fine for selling paint that exceeded VOC limits. in violation of CAA

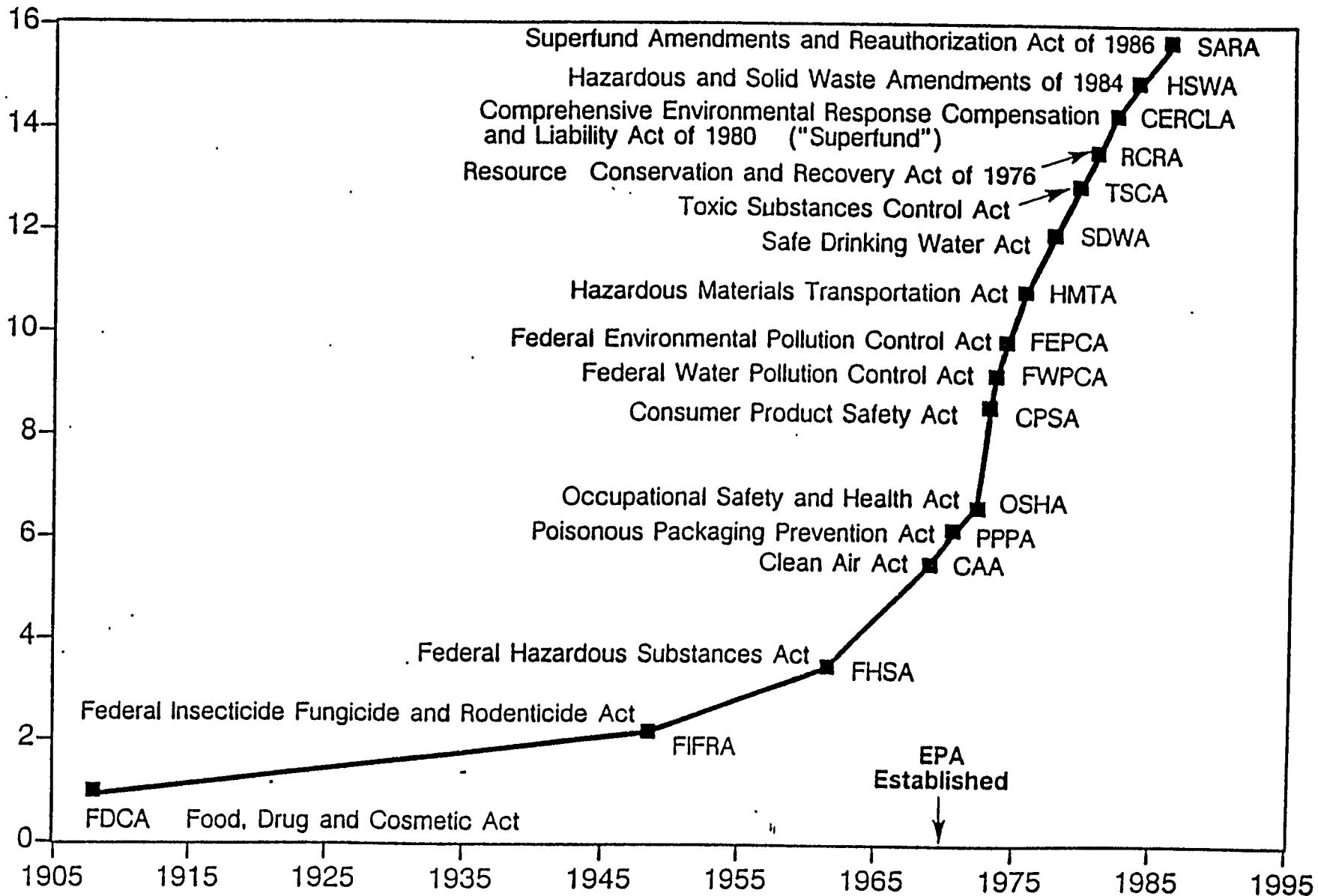
Wells Metal Finishing - Owner and company convicted of knowingly discharging zinc and cyanide into-company's waste water that went city treatment facility owner sentenced 15 months in prison and 1 year probation and a \$60,00 fine.

Exxon Valdez -\$900 million to \$1 billion to settle civil charges, criminal fines and restitution \$250 million (\$125 million to be credited from the voluntary cleanup conducted).

Manner Berman - 3 officers entered guilty pleas to charges of engaging in a conspiracy to violate RCA after charges were brought based on illegal storage, transportation and disposal of hundreds of drums of paint wastes; company must pay fine of \$500,000 to EPA and state agency, officers received sentence of 1 year imprisonmentL

Federal Laws Pertaining to the Control of Chemicals in the United States

Number of Laws



Memorandum



Subject	Date
Environmental Criminal Statistics FY83 Through FY91	March 26, 1992

To Neil S. Cartusciello, Chief From Peggy Hutchins
 Environmental Crimes Section Paralegal

From the beginning of FY83 through FY92, the Department of Justice has recorded environmental criminal indictments against 899 corporations and individuals, and 676 guilty pleas and convictions have been entered. A total of \$207,996,198 in criminal penalties has been assessed. More than 387 years of imprisonment have been imposed of which more than 189 years account for actual confinement.

Of the 899 defendants indicted, 281 were corporations, and the remaining 618 were individuals. Of the 676 convictions, 226 have been against corporations, and the remaining 450 against individuals.

BREAKDOWN

	<u>Indictments</u>	<u>Please/Convictions</u>
FY 83	40	40
FY 84	43	32
FY 85	40	37
FY 86,	94	67
FY 87	127	86
FY 88	124	63
FY 89	101	107
FY 90	134	85
FY 91	125	96
FY 92	7 1	63
TOTAL	899	676

<u>Fed. Penalties Imposed</u>	<u>Prison Terms</u>	<u>Actual Confinement</u>
FY 83 \$ 341,100	11 yrs.	5 yrs.
FY 84 384,290	5 yrs. 3 mos.	1 yr. 7 mos.
FY 85 565,850	5 yrs. 5 mos.	2 yrs. 11 mos.
FY 86 1,917,602	124 yrs. 2 mos. 2 days	31 yrs. 4 mos. 12 days
FY 87 3,046,060	32 yrs. 4 mos. 7 days	14 yrs. 9 mos. 22 days
FY 88 7,091,876	39 yrs. 3 mos. 1 day	8 yrs. 3 mos. 7 days
FY 89 12,750,330	51 yrs. 25 mos.	36 yrs. 14 mos.
FY 90 * 29,977,508	71 yrs. 11 mos. 3 days	47 yrs. 13 mos. 1 day
FY 91 18,508,732	24 yrs. 8 mos.	22 yrs. 8 mos.
FY 92 *\$133,412,850	<u>20 yrs. 4 mo.</u>	<u>17 yrs 9 mo.</u>
TOTAL \$207,996,198	382 yrs. 65 mos. 13 days (387 yrs. 5 mo. 13 days)	183 yrs. 78 mos. 42 days (189 yrs. 7 mo 11 days)

- * This total includes a \$22 million forfeiture that was obtained in a RICO/mail fraud case against 3 individuals and 6 related waste disposal and real estate development companies. A major portion of this forfeiture is expected to be designated for hazardous waste cleanup upon liquidation of assets. Included in the jail terms are two 12 year/7 month sentences against two individuals in the same RICO/mail fraud case.
- * This total includes a \$125 million of a \$250 million criminal assessment against Exxon Corp. and Exxon Shipping Co. for the Valdez oil spill. \$12 million of the \$250 million criminal sentence was remitted (forgiven) for pledges by Exxon to expenditures far exceeding this amount on environmental safety projects, a contribution to a response fund for large-scale oil spills, and committing 25% of their total research expenditure on environmental and safety research.

M E M O R A N D U M

February 20, 1990

FROM: JOHN L WITTENBORN
ROBIN A. FASTENAU

RE: CRIMINAL LIABILITY UNDER FEDERAL ENVIRONMENTAL
STATUTES

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INTRODUCTION

Criminal prosecution is on the rise as a major tool in enforcing environmental laws and regulations. Over the past few years the Environmental Protection Agency ("EPA") and the Department of Justice have undertaken a concerted effort to increase criminal environmental indictments. Convictions following these indictments have increasingly resulted in prison sentences, criminal fines, as well as corporate debarment from government contracts. During the first half of fiscal year 1989, the Justice Department successfully imposed some \$9.7 million in fines and almost 36 years of imprisonment for environmental crimes. (See Attachment A).

Along with the increased numbers of criminal cases, prosecutors are increasing conviction rates by indicting corporations under statutes that have broad standards for establishing criminal liability. At the same time, judges have used their sentencing

discretion under these statutes to increase criminal penalties for convictions under the environmental laws.

These trends are of significant concern to corporations and corporate officers. To protect against the potential use of the criminal sanctions in enforcing environmental laws, corporations must actively manage environmental compliance. In addition corporations should take an activist role in drafting or amending proposed legislation which would define the scope of criminal conduct and standardize penalties for violations of the environmental laws. Legislation is now pending in Congress which would greatly expand the scope and severity of environmental crimes. This memorandum briefly describes the proposed legislation and suggests a strategy for modifying its onerous terms. In addition this memorandum summarizes the current standards for establishing criminal liability and the recent Federal court sentencing guidelines.

STANDARDS USED IN ESTABLISHING CRIMINAL LIABILITY

There are approximately twenty-three statutes that provide for the protection of the environment. All but two of these statutes protect the environment through the use of criminal as well as civil penalties.¹ However, because each of these statutes protects specific areas of the environment, each also specifies the standard of conduct which will give rise to criminal liability.

¹ The following statutes establish criminal penalties for violations of their provisions the Federal Water Pollution Control Act; the Clean Air Act ("CAA"); the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"); the Deepwater Port Act of 1974; the Endangered Species Act of 1973; the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"); the Federal Land Policy and Management Act of 1976; the Migratory Bird Treaty Act; the Marine Mammal Protection Act of 1972; the Marine Protection, Research and Sanctuaries Act Act of 1972; the Noise Control Act of 1972; the Outer Continental Shelf Linda Act; the Ports and Waterways Safety Act of 1972; the Solid Waste Disposal Act; the Rivers and Harbors Appropriation Act of 1899; the Safe Drinking Water Act; the Surface Mining Control and Reclamation Act of 1977; the Toxic Substances Control Act; the Wild Free-Roaming Horses and Burros Act; the Hazardous Materials Transportation Act and the key Act Amendments of 1981. Both the Coastal Zone Management Act of 1972 and the Wild and Scenic Rivers Act also protect the environment but do not contain criminal penalties.

Virtually all of the federal environmental statutes require a knowing or willful violation of the underlying statutory provisions before imposing criminal penalties.² This requires proof that the defendant acted deliberately with an awareness of the probable consequences of his actions. The actions are generally of two types: 1) a violation of a requirement order or prohibition such as discharging without or in violation of a permit; or 2) falsifying records, improper certification or failure to file appropriate forms. For example, under the Resource Conservation and Recovery Act ("RCRA"), any person who "knowingly transports" any hazardous waste without an applicable permit may be criminally fined and imprisoned for the offense. Similarly, under the Clean Air Act any person who "knowingly" violates a hazardous air pollutant national emission standard may be held criminally liable for the act, and under the Superfund Amendments and Reauthorization Act ("SARA"), any person who "knowingly" or "willingly" fails to provide emergency notice of a release shall be criminally liable for that failure.³

Additionally, under some specific statutes a criminal violation for knowingly endangering the lives or health of individuals is established. Under the Clean Water Act

² This includes all of the statutes identified in footnote 1, except the Clean Water Act ("CWA"), which provides for criminal penalties for negligent violations as well as knowing violations, and the Rivers and Harbors Act of 1899 which is a strict liability statute.

³ Specific examples of criminal convictions or guilty pleas to criminal indictments include the following: United States v. Collins, No. CR 88-019-NE (N.D. Ala. April 25, 1988) (company sentenced under CERCLA, RCRA and CWA for unlawful transportation and disposal of hazardous wastes in creeks and rivers and failure to notify state or federal authorities concerning the releases); United States v. Vanderbilt Chemical Corp., No. N-89-16 JAC (D. Conn. May 31, 1989) (company agreed to pay \$1 million fine for illegal disposal of hazardous wastes); United States v. Chase Interiors, Inc., No. 88-199 (W.D.N.Y. May 15, 1989) (guilty plea to illegally disposing of hazardous substances under RCRA by directing employees to attach a pump and spray gun to some waste drums and pumping the contents into a fan chamber emitting the wastes into the air and dumping wastes into a water drain); United States v. Jay Woods Oil Co. Inc., 87 CR 20012 BC 02 (E.D. Mich. May 19, 1987) (first criminal conviction under Safe Drinking Water Act, company fined \$4,000 for tampering with underground injection wells to conceal the fact that the wells would not pass EPA tests); United States v. Argent Chemical Laboratories Inc., No. Cr. 88-023D (W.D. Wash. Mar. 31, 1988) (the first company prosecuted under criminal provision of FIFRA; company agreed to pay \$70,000 fine and remain on probation for five years after pleading guilty to four counts of illegal pesticide sales and two felony counts of falsely representing to EPA and FDA that it did not produce, manufacture, or distribute produce); United States v. Pennwalt Corp., No. CR88-55T (W.D. Wash.), Haz. Waste Lit. Rep. at 17,433 (June 19, 1989) (company agreed to pay \$500,000 criminal penalty and \$600,000 to the Coast Guard for cleanup of the discharge of contaminated chemicals from a ruptured storage tank -- the fines were for illegal discharges under the Clean Water Act and improper reporting of the spill under CERCLA). The foregoing cases were cited in various issues of the Bureau of National Affairs Environmental Reporter, vols. 19 and 20.

a corporation which knowingly violates specific sections of the Act or a permit condition and which knows at that time that it places another person in imminent danger of death or serious bodily injury shall face potential Criminal penalties of up to \$1,000,000. Similarly, under RCRA any corporation which knowingly transports, treats, stores or disposes of hazardous waste and which knows at the time that it places an individual in imminent danger of death or serious bodily injury shall be subject to a fine of not more than \$1,000,000. In United States v. Protex Industries. Inc., 874 F.2d 740 (10th Cir. 1989), the Court of Appeals upheld the criminal conviction of Protex under the knowing endangerment provisions of RCRA. The lower Court fined Protex \$7.6 million (all but \$400,000 of the fine was suspended contingent on the company's clean up of the site and the payment of restitution to three employees) because it had placed employees in imminent danger by violating RCRA'S safety provisions.

Corporations are presumed to have knowledge of the statutory requirements of the environment laws, and for example, the knowledge of a defendant as to whether a company has a permit for a particular discharge will not be a defense to liability. See, e.g., United States v. Hoflin 880 F.2d 1033 (9th Cir. 1989). There are specific" statutes, however, which do not require a knowing or willful violation in order to convict a corporation of criminal activity. under the Clean Water Act, a defendant may be criminally liable for negligently violating the terms of the Act. This negligence standard is established by showing that the defendant corporation either acted or failed to act in a reasonably prudent manner, and because of this action or inaction, a violation of the Clean Water Act occurred. While the definition of "reasonably prudent conduct" will vary in any particular circumstance, under this standard at least some degree of

inappropriate conduct on the part of the corporation must be established by the government. The Clean Water Act is currently the only environmental statute which provides criminal penalties for negligent conduct.

Under the Rivers and Harbors Appropriation Act of 1899, no showing of misconduct is required. Any violation of the provisions of the statute may be criminally prosecuted. This Act makes it unlawful, in Part to discharge either from a ship or from a shore, wharf or manufacturing establishment any refuse matter of any kind or description into any navigable water of the United States. Under its provisions, liability is strict - the government is not required to make any showing of knowledge and/or negligence. Despite the age of the statute, the government has recently used it in prosecuting both individuals and corporations. See, e.g., United states v. Pollution Abatement Services of Oswego. Inc., 763 F.2d 133 (2d Cir. 1985); United States v. Ashland Oil. Inc., No. 88-146 (W.D. Pa. March 3, 1989).

In addition to criminal prosecution under specific environmental statutes, corporations have also been prosecuted under both the Racketeer Influence and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. ("RICO"), and the criminal conspiracy statute, 18 U.S.C. 5371, which have their own standards of establishing liability. see, e.g., United States v. MacDonald & Watson Waste Oil co. No. CR 32 (D.R.I. April 26, 1988) 18 Env't Rep. (BNA) 2555 (April 29, 1988) (grand jury indicted company for violating waste disposal laws and mail fraud under RICO); United States v. Fineman Cr. No. 88-54 (E.D. Pa. May 15, 1989) 20 Env't Rep. (BNA) 497 (June 30, 1989) (contractor with HMC recycling company pleaded guilty to conspiracy to violate the Clean Air Act and CERCLA for improperly handling and removing waste materials containing asbestos)

SENTENCING

The penalties to be assessed for criminal violations of the various environmental statutes are specified in each of the statutes. Generally, they range from a maximum fine of \$25,000 per day of violation and imprisonment for not more than one year, under the Clean Air Act and Clean Water Act (negligent violations), to maximum penalties of not more than \$50,000 for each day of violation under the CWA (knowing violations), RCRA, FIFRA, and CERCLA. Separate penalties are authorized under RCRA and the Clean Water Act for knowing endangerment violations.⁴

However, these statutory penalties may be increased based on a statutory sentencing alternative or sentencing guidelines established for environmental crimes. In a recent decision United States v. Ashland Oil, Inc., No. 88-146 (W.D. Pa. March 9, 1989), a court for the first time in an environmental case, sentenced a defendant using the alternative fine schedule established in the federal criminal code. The statute allows a judge, in part to fine a corporation not more than the greatest of the amount specified in the law setting the offense, or twice the gross gain to the defendant or twice the gross loss created by the offense. 18 U.S.C.A. § 3571(d) (West Supp. 1989). The Ashland case was based on the collapse of a storage tank which was later found to have a flawed tank shell, dumping approximately 750,000 gallons of diesel fuel into the river systems of three states. The judge limited the fine, which according to Justice Department officials could have been as high as \$14.4 million on each count based on the damages suffered to \$2.25 million because of Ashland's responsible actions in

⁴ One significant distinction between the statutes relating to penalties is that under the Clean Air and Clean Water Acts a criminal conviction requires that the defendant be placed on a list of debarred contractor who may not receive federal grants, loans or contracts that are to be implemented at the facility where the violation occurred.

cleaning up the problem. To date, the Ashland case is the only decision in which the COurt sentenced a defendant for environmental crimes using the alternative sentencing procedures. It is unclear whether this sentence will establish a trend in that direction.

Statutory penalties resulting from convictions for environmental crimes can also be increased based on the sentencing guidelines created by the United States Sentencing Commission for environmental crimes. see 18 U.S.C.A APP. part Q (west Supp. 1989). Under the sentencing guidelines applicable to offenses involving the environment, the guidelines set a basic offense level then allow federal district courts to apply adjustments in determining an appropriate criminal sentence. Environmental crimes covered include mishandling of hazardous or toxic substances, mishandling of other environmental pollutants and tampering with public water systems. The guidelines suggest that judges establish the offense level as a base and then account for such factors as a person's role in an offense, their cooperation with federal authorities and prior criminal record in imposing a sentence. We are aware of three instances in which these guidelines have explicitly been used in an environmental context. e.g., United States v. McKiel Cr. No. 89-24-N (D. Mass. June 29, 1989) 20 Env't Rep. (BNA) 520 (July 7, 1989) (judge sentenced two officials of an electroplating company to jail terms based on the sentencing guidelines, an emphasis on federal enforcement of environmental laws and an increased regional effort to protect the local drinking water). The sentencing guidelines were also used to increase penalties in United States v. Mills, No. 89-3325 (11th Cir. 1989) and United States v. Pozsgai, No. 89-1640 (3rd Cir. 1989), both of these decisions are currently on appeal. 20 Env't Rep. (BNA) 1574 (Jan. 12, 1990). It is unclear whether

these guidelines which only apply to activities occurring after 1987 will be increasingly used in the futures

PROPOSED LEGISLATION

On November 9, 1989, Congressman Schumer (D-NY) introduced H.R. 3641, the Environmental Crimes Act of 1989, amending title 18 of the United States Code with respect to environmental crimes. The bill seeks to establish a more uniform system of penalties for criminal violations of the twenty-three environmental statutes identified.

Under the provisions of the bill if a corporation violates the criminal provision of any of these statutes and thereby it knowingly ~~recklessly~~ ~~casus~~ a risk of 1) imminent death of a human being 2) serious bodily injury to a human being;⁶ or 3) environmental catastrophe,⁷ then it shall be punished in accordance with the increased penalties specified under the Environmental Crimes Bill rather than under any penalties specified in the statutes creating the offense.

The bill additionally creates a separate crime for individuals and organizations which engage in a "course of illegal conduct" causing risks of imminent death, serious bodily injury, or an environmental catastrophe. A course of conduct can be established

- 5 General sentencing guidelines for corporations have been proposed by the sentencing Commission. The guidelines are not yet final and the Commission has requested written comments by February 15, 1990. We have enclosed a copy of the draft guidelines for your review as Attachment B to this memorandum.
- 6 The term "seriously [sic] bodily injury" is defined as bodily injury that involves: substantial risk of death; extreme physical pain; protracted and obvious disfigurement; reproductive or genetic damage; or increased risk of cancer or other chronic ailment. Thus, a violation which results in a negligent exposure to a suspected carcinogen may be punishable under this bill.
- 7 An "environmental catastrophe" is broadly defined to include: a) death or injury to a member of a threatened or endangered species of fish, wildlife, plant or other natural resource; b) death or injury to twenty percent of the known population of any species within a defined ecosystem; c) death or injury to five percent of the known population of any species of fish or wildlife within the United States or its waters; or d) the destruction or alteration of habitat or release of any pollutant that causes: 1) serious disruption of any ecosystem or food chain; 2) environmental contamination that cannot be remedied without causing significant environmental damage; 3) serious genetic effects on any species of fish, wildlife or plant; 4) serious disruption or alteration of local, regional, or global climate; or 5) significant waste or misuse of public natural resources.

by two or more offenses which contribute to the risks identified. Third, the bill creates the crime of negligently endangering life or causing an environmental catastrophe. Because most of the environmental statutes do not now provide for liability for negligent conduct, this new offense is a significant departure from current standards. Substantial jail terms and fines are established for violations of these provisions, with increased penalties for second offenses.

Once convicted of an environmental offense under the terms of H.R. 3641, a court shall when sentencing an organization for a felony (or may when sentencing an organization for a misdemeanor) place the organization on probation and require as a condition of probation that the organization undergo, comply with and pay for an environmental audit. This is a significant departure from existing law. Under this provision, the court will appoint an independent expert to conduct the audit. The auditor may review any information which formed the basis of the conviction, identify all pollutants routinely discharged by the organization whether or not they formed the basis of the criminal violation, and recommend pollution prevention measures to reduce such discharges to the degree technologically and economically feasible. The audit may include all facilities owned by the defendant, including those not involved in the criminal proceeding.

A court will order that the recommendations of the independent auditor be enforced unless it finds by clear and convincing evidence that (1) the recommendations will not bring about sought after results, (2) the adverse environmental effects outweigh the environmental benefits of the recommendations, or (3) the technology does not exist to carry out the recommendations.

H.R. 3641 has been referred to the House Judiciary Committee where one hearing on the bill has already been conducted.

CONCLUSION

Prosecutors are using a variety of statutes to criminally indict specific corporations and corporate officers for violations of the environmental statutes. These statutes employ differing standards and penalties. The trend favors criminal provisions which allow conviction based upon a standard of strict liability and which allow for enhanced felony convictions and sentences. This trend could be blunted by the creation of environmental crimes legislation which would standardize both the basis for criminal prosecutions and the penalties for conviction under such a statute. H.R. 3641, which is currently pending, seeks to accomplish this objective; however, the bill as introduced is far too broad and imposes severe criminal penalties for conduct which is not even criminal in the underlying statute. To protect your personal and corporate interests you should actively participate in your company's environmental compliance efforts and demonstrate strong support for legislation which more fairly establishes a needed comprehensive environmental crimes law.

Memorandum**Subject****Date**

statistics FY83 to present

June 6, 1989

To Joseph G. BLOCK, Chief From Paggy Hutchins
 Environmetal Crimes Section Paralegal

From the beginning of FY83 to the present, our Section has recorded 532 indictments against Corporations and individuals, and 406 Pleas have been entered. A total of \$23,083,878 in federal fines has been assessed. More than 253 years of jail time have been imposed which nearly 87 years account for actual time served.

Of the 532 defendants indicted, 149 were corporations and the remaining 383 were individuals. Of the 406 convictions, 118 have been imposed against corporations, and the remaining 288 against individuals.

		BREAKDOWN	
Indictments			Pleas/Convictions
FY 83	40		40
FY 84	43		
FY 85	40		37
FY 86	94(+85*)		67(+83*)
FY 87	127		86
FY 88	124		63
FY 89	64		81
TOTAL	532		406

*These numbers stem from one investigation in Taxes and Louisiana involving pesticides under FIFRA and violations of the MBTA and are not included in the total.

	Fines Imposed	Jail Terms	Actual Confinement
FY 83	341,100	11 yrs.	5 yrs 1
FY 84	384,290	5 yrs. 3 mos.	1 yrs 7 mos.
FY 85	565,850	5 yrs. 5 mos.	2 yrs. 11 mos.
FY 86	1,917,602	124 yrs. 2 mos. 2 days	31 yrs. 4 mos. 12 day
FY 87	3,046,060	4 mos. 7 days	14 yrs 1 9 mos. 22 day
FY 88	7,091,876	39 yrs. 3 mos. 1 day	8 yrs. 3 mos. 7 day
FY 89	\$23,083,878	251 yrs. 25 mos. 10 days	83 yrs. 41 mos. 42 day
		(253 yrs. 10 days)	(86 yrs. 6 mos. 12 day)

M E M O R A N D U M

FEBRUARY 20, 1990

FROM JOHN L WIITENBORN
 ROBIN A. FASTENAU

RE: PERSONAL LIABILITY UNDER THE ENVIRONMENTAL STATUTES

INTRODUCTION

Federal criminal and civil enforcement of the environmental laws has increased dramatically in the past few years. At the same time, both the Environmental Protection Agency and the Department of Justice have begun to focus upon individual as well as corporate misconduct. Although the various environmental statutes address different substantive areas of environmental regulation and contain different proscriptions, each statute either directly imposes liability on certain individuals or has been interpreted by courts to provide for such liability. With this shift toward individual, personal accountability for violations of environmental statutes, it is important that individuals, specifically those in positions of authority within corporations, be aware of this trend and take steps to minimize their liability.

I. CML LIABILITY FOR INDIVIDUALS

Individuals are frequently held personally liable for civil violations of environmental statutes. This liability can be based either on the individual's direct liability as a responsible party under the statute or on the individual's indirect liability as the "alter ego" of the responsible party. Indirect liability is based on the concept of "piercing the corporate veil" - a legal doctrine whereby individuals can be held liable for an activity because their complete domination over the corporation would make it unfair to limit liability to the corporate entity.

The key to imposing direct civil liability on an individual is whether that person is a "responsible person" under the statute in question.¹ That determination depends on the degree of control exercised by the individual over the corporation. Generally, courts have held an officer personally liable for acts in which he participated or for which he was directly responsible. E.g., United States v. Motollo, 629 F. Supp. 56, 22 ERC 1026 (D.N.H. 1984) (president could be held personally liable for cleanup costs under CERCLA if he personally participated in the waste removal decisions); United States v. Conservation Chemical Co., 619 F. SUPP. 162, 187-190, 24 ERC 1008 (W.D. Mo. 1985) (corporate officer who actively participated in the management of a waste disposal facility can be personally liable under CERCLA for cleanup costs); United States v. Carolawn Co., 21 ERC 2124 (D.S.C. 1984) (to extent that individual had control authority over the actions at a facility from which hazardous substances are released and was responsible for day-to-day disposal operations he may be personally liable for CERCLA response costs in cleaning up the site); United States v. Pollution Abatement Services of Oswego Inc., 763 F.2d 133, 22 ERC 2068 (2d Cir.); cert. denied, 474 U.S. 1037 (1985) (corporate officers who personally participated and authorized storage of highly toxic chemicals which contaminated the water were personally liable under the Rivers and Harbors Act).

However, the scope of potential liability goes beyond those individuals who participated in the management of waste disposal practice to include those individuals who had the capacity to control the disposal activity. In United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 745-46, 25 ERC 1385 (8th Cir. 1986), cert. denied, 108 S. Ct. 146 (1987), the court held officers of the corporation personally liable under RCRA and CERCLA for unlawful disposal of hazardous substances in a trench. One of the officers who was held liable for the CERCLA violation actually supervised the disposal of waste at the farm; however, another officer was held liable under RCRA for contributing to the disposal of hazardous waste because he was the corporate president and was in charge of and responsible for all corporate operations.

1 Each of the environmental statutes has its own proscriptions, the violation of which will impose liability on the responsible person. For example, under RCRA, "any person contributing to" the disposal of hazardous wastes constituting an endangerment to the environment may be held liable for damages resulting from such actions. Additionally, any "person" in violation of any requirements of RCRA, such as permitting or recordkeeping requirements, is subject to a civil penalty. Under CERCLA, civil liability may be imposed upon any past or present "owner or operator" of a facility or "any person" arranging for disposal or transportation of hazardous substances if any remediation activity is associated with that substance. Additional civil penalties can be imposed for the failure to fulfill requirements under the Emergency Planning or Community Right-to-Know Act. The Clean Water Act imposes liability on "any person" in violation of the Acts requirement and any "owners, operators and persons in charge" are also liable for unreported releases of oil or hazardous substances.

The fact that the president was located half-way across the country from where the disposal occurred was not a defense to liability. Similarly, in Vermont v. Statco, Inc.,⁶⁸⁴ F. Supp. 822, 27 ERC 1084 (D.Vt. 1988), the defendants, as owning and managing stockholders, were held personally liable for RCRA violations because each was either personally involved in the corporate acts of the company or was in a position as a corporate officer or majority shareholder to have ultimate authority to control the proper handling of chemicals at the facility.

In a recent decision, a Michigan court was asked to clarify the legal standard by which corporate officers and directors may be held directly liable under CERCLA. In Michigan v. ARCO Industries Corp.,⁷²³ F. SUPP. 1214, 1219-20 (W.D. Mich. 1989), the court stated that in assessing individual liability-- court should weigh the following factors in order to determine whether the individual is liable under the-statute:

evidence of an individual's authority to control, among other things, waste handling practices-evidence such as whether the individual holds the position of officer or director, especially where there is a co-existing management position; distribution of power within the corporation, including position in the corporate hierarchy and percentage of shares owned. Weighed along with the power factor will be evidence of responsibility undertaken for waste disposal practices, including evidence of responsibility undertaken and neglected, as well as affirmative attempts to prevent unlawful hazardous waste disposal. Besides responsibility neglected, it is important to look at the positive efforts of one who took clear measures to avoid or abate the hazardous waste damage. Therefore, the Court will look to this evidence when determining liability by the "prevention" test.

In addition to direct personal civil liability based upon personal responsibility for the damage or violation, individuals in control of corporations could also face indirect potential liability based on the legal doctrine whereby a court will "pierce the corporate veil" to reach these individuals. See, e.g., United States v. Nicolet,⁷¹² F. Supp. 1193 (E.D. Pa. 1989).

Although the Nicolet case addressed parent corporate liability for the environmental violations of its subsidiary, the rationale for the holding is equally appropriate to individuals controlling corporate activities. The court in Nicolet stated the appropriate basis for piercing the corporate veil under CERCLA as follows:

Where a subsidiary [corporation] is or was at the relevant time a member of the classes of persons potentially liable under CERCLA; and the parent [director or officer] has a substantial financial or ownership interest in the subsidiary

[corporation], and the parent corporation [director or officer] controls or at the relevant time controlled the management and operations of the subsidiary [corporation], the parent's [director's or officer's] separate corporate existence may be disregarded.

712 F. Supp. at 1202.

It is clear that traditional notions of limiting corporate liability to the corporate assets will not be applied in situations where the environmental statutes have been violated. Accordingly, individuals who participate in waste management or disposal decisions, individuals who have the authority to exercise control over such practices, as well as individuals who exercise sufficient control over the corporation to warrant piercing the corporate veil must assure themselves that the corporation is complying with all applicable environmental statutes or they may personally be liable for the actions of the corporation.

II. CRIMINAL LIABILITY FOR INDIVIDUALS

Many environmental statutes also provide for criminal penalties for violations of specific statutory provisions. The general rule is that individuals may be held liable for acts performed in their official capacity only when they actively participated in, directed or authorized a violation of the law. Most environmental statutes require an individual to have knowingly or willfully Violated a statutory prohibition in order to prove criminal liability.² E.g., United States v, Frezzo Brothers Inc. 461 F. Supp. 266, 12 ERC 1481 (E.D. Pa 1978), affd. 602 F.2d 1123, 13 ERC 1403 (3rd Cir. 1979), cert.denied. 444 U.S. 1074 (1980).

2 For example, under RCRA, any person who knowingly violates statutory or regulatory requirements regarding the transportation treatment, storage or disposal of hazardous waste may be criminally liable for such a violation. RCRA also has criminal penalties for knowingly treating, transporting, storing or disposing of hazardous waste which at the time places another person in imminent danger of death or serious bodily injury. CERCLA imposes criminal liability on any person who knowingly or willfully fails to provide emergency notice of a release of a hazardous substance required to be reported under Section 304 of the Emergency Planning and Community Right-to-Know Act. Both the Clean Water Act and CERCLA contain criminal penalties for the failure of the "person in charge" of a facility to notify the government when a release of a hazardous substance, other than a Federally permitted release occurs. The Clean Water Act is broader in the range of conduct for which criminal liability may be imposed by assessing criminal liability for both the "willful" or "negligent" failure to comply with the statutory requirements.

However, courts have also inferred knowledge of a violation from the failure to provide adequate supervision to those individuals delegated to monitor and/or correct environmental problems. United States v. Haves International Corp., 786 F.2d 1499, 24 ERC 1282 (11th Cir. 1986) (owner of an airplane refurbishing plant which generated certain waste products was liable for the improper disposal of its waste because the hauler employed by Hayes did not have a permit to dispose of the waste and failed properly to dispose of it); United States v. Ward, 676 F.2d 94, 17 ERC 1577 (4th Cir.), cert. denied, 459 U.S. 835 (1982) (defendant's knowledge of improper disposal of toxic substances under TSCA by vendor of defendant could be referred by officer's outfitting disposal vehicles and the low price paid for the oil).

There is some question as to the meaning of a "knowing" violation under the environmental statutes. For example, in Haves International, the court held that under RCRA the government had to prove only that the defendants knew that the facility to which the waste had been sent lacked a permit. In that case, the Court of Appeals found that the defendants acted knowingly when they willfully failed to determine the permit status of a facility and that the knowledge of the absence of a permit could be inferred from circumstantial evidence such as the recycler's willingness to dispose of the waste at an unusually low price. On the other hand, the U.S. Court of Appeals for the Third Circuit held in an earlier decision that corporate employees could be criminally liable only if they "knew both that the corporation was required to obtain a permit and also that the corporation did not possess a permit." United States v. Johnson & Towers, Inc., 741 F.2d 662, 667, 21 ERC 1433 (3rd Cir. 1984), cert. denied 469 U.S. 1208 208 (1985). However, the court went on to state that "such knowledge, including that of the permit requirement, may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant." Id. at 670.

Another area of dispute is what level of responsibility is required for establishing an individual's criminal liability. Under the Clean Water Act, the statute defines "person" for purposes of imposing criminal liability to include "any responsible officer." RCRA and CERCLA, on the other hand, simply provide that any "person" may be held liable for criminal violations. In a recent decision under CERCLA, the court analogized criminal liability in CERCLA to that under Section 311 of the Clean Water Act, and concluded that the term "person" under CERCLA was designed to cover supervisory personnel who have the responsibility for the particular facility. United States v. Carr, 880 F.2d 1550, 30 ERC 1128 (2d Cir. 1989).

In Carr, the court addressed the issue of whether the supervisor of maintenance at an army camp was "in charge of facility" such that he could be held criminally liable for the failure to report a release of a prohibited amount of a hazardous substance under section 103 of CERCLA. The court held that the definition of a person does not exclude lower-level supervisory employees such as Carr who was a maintenance supervisor that directed a work crew to dispose of waste and paint in an improper manner and failed to report the release. Additionally, the court approved the use of a jury instruction in which the jury was told that Carr need not have exercised sole control

over the facility in order to find him criminally liable. The Carr decision is important because it shows a willingness on the part of courts to expand individual criminal liability beyond the officers and directors of the organization that violated the environmental statute to include lower-level supervisors. The trend appears to be that courts are willing to hold any individual who could have prevented the violation liable for the consequences of this inaction.

CONCLUSION

Courts are increasingly imposing criminal and civil liability on individuals for personal and corporate violations of the environmental statutes. The imposition of individual liability appears to be a deliberate attempt to place liability on those individuals who cause environmental problems, as well as those individuals who can prevent problems from occurring. This trend in environmental enforcement will only continue to increase and to expand to include larger groups of individuals. Thus, in order to avoid personal liability, employees, especially those in positions of authority, must assure themselves that they, as individuals, and their corporations are complying with all environmental laws.

GAO Report: Environmental Envorcement -
Penalties May not Recover Economic
Banefits Gained By Violators

Resources, Community, and
Economic Development Division

B-243879

June 17, 1991

The Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate

The Honorable John Conyers, Jr.
Chairman, Committee on Government Operations
House of Representatives

In separate requests, dated May 10, 1990, and December 20, 1990, you requested that we examine the Environmental Protection Agency's (EPA) enforcement efforts to ensure that they are well managed and effectively carried out. In light of earlier GAO and EPA Inspector General reports, which highlighted EPA's low penalty assessments, you asked us to focus particularly on EPA's penalty policies and practices. To answer your concerns, we examined overall national trends in penalty assessment within EPA's four major enforcement programs-air, water, hazardous waste, and toxic substances-using an analysis of penalty data provided by EPA. We also spoke with EPA program officials and selected regional and state officials who shed light on some of the problems underlying penalty practices.

Results in Brief

Because penalties should serve as a deterrent to violators and should ensure that regulated entities are treated fairly and consistently, it has been EPA's policy since 1984 that penalties for significant violations of environmental regulations be at least as great as the amount by which a company would benefit by not being in compliance. However, in nearly two out of three penalty cases concluded in fiscal year 1990 in EPA's air, water, hazardous waste, and toxic substances programs, there was no evidence that this economic benefit had been calculated or assessed. Thus, although the agency's final penalty assessments in these cases amounted to about \$28 million, the widespread absence of documentation makes it impossible to calculate the amount the agency actually should have collected at a minimum.

State and local enforcement authorities-who are responsible for more than 70 percent of all environmental enforcement actions-do not regularly recover economic benefit in penalties, according to previous GAO and EPA Inspector General reports. Moreover, in cases that we and others have reported on, repeated violations have occurred in the absence of penalties.

Many factors may deter regulatory officials from following EPA's penalty policy—such as a philosophy of enforcement based on working with violators to obtain compliance rather than imposing penalties and **pressures to settle cases because of limited resources for litigation**. The agency has recognized that corrective actions are needed, but we believe that without additional management controls penalty practices are not likely to improve. EPA headquarters does not have sufficient information to oversee its regional office practices, and the organizational responsibilities for enforcement are diffuse, with 15 offices responsible for either setting or carrying out enforcement policies. In addition, although it has the authority to require it, EPA has only encouraged the states to adopt an economic benefit penalty policy, in the belief that states must first meet more fundamental enforcement program requirements. However, in two EPA regions we reviewed, fewer than half of the authorized state programs have adopted such a penalty policy, and in the absence of a federal requirement, others are unlikely to do so.

Background

Under several federal environmental statutes, including the Clean Air and water Acts, EPA is responsible for issuing regulations in support of statutory requirements and for polluting facilities to make sure they are following prescribed emission and effluent controls and levels. While EPA regional offices can act as the direct enforcement authority, most statutes provide for EPA to delegate enforcement authority to states and, in some cases, localities, as long as their programs meet federal criteria and approved by EPA; one exception is the Toxic Substances Control Act, which allows states to regulate chemicals to some extent but does not provide for program delegation. EPA regions remain responsible for overseeing these authorized states and local governments and for taking direct enforcement action if state and local agencies fail to do so. EPA can also revoke a state's authority if its program fails to meet federal standards. Since assuming direct regulatory authority, states and localities are now responsible for more than 70 percent of all formal environmental enforcement actions taken in the United States.

When violations are detected, EPA Policy requires enforcement agencies to follow a defined set of procedures and schedules. For minor violations, these agencies may issue warning letters. If these violations are not corrected or if they are serious, civil or criminal remedies and sanctions may be sought. Civil remedies and sanctions may be imposed either administratively, by the enforcing agency, or judicially, by the courts. According to EPA officials, EPA generally chooses to seek civil

judicial remedies in cases that set precedent or involve extensive environmental harm.

For many violations, federal and state laws authorize enforcement agencies or the courts to impose penalties. Federal laws generally specify a maximum amount and several factors that must be considered in assessing penalties, including the severity of the violation, good faith efforts to comply, and the economic benefit of noncompliance. EPA has the discretion to set any other penalty policy.

Penalties play a key role in environmental enforcement by acting as a deterrent to violators and by ensuring that regulated entities are treated fairly and consistently, with no one gaining a competitive advantage by violating environmental regulations. In certain programs, other types of sanctions are also available to enforcement agencies, such as permit revocation and shutdown of operations, denial of government contracts, and bans on use of public sewers. Authorities generally favor penalties, however, because, among other reasons, they provide the agencies with greater flexibility and can be made to fit the violation much more than, for example, shutting down a plant.

EPA's Uniform Civil Penalty Policy

In 1984, EPA established for all its regulatory programs a uniform penalty policy that requires regional enforcement officials to assess penalties that are at least as great as the amount by which a company would benefit by not complying with the law. According to this policy, which is still in effect, the final assessed penalty is supposed to include this minimum Penalty—the economic benefit component—as well as a gravity component determined by the seriousness of the violation.

The policy allows enforcement officials to reduce the gravity component during settlement negotiations when the violator has made a good faith effort to come into compliance, when no history of violations has occurred, or for various other reasons. However, the policy requires full recovery of the economic benefit component except when (1) a facility can demonstrate that it is unable to pay, (2) significant public interest concerns such as plant closings are involved, or (3) EPA would probably not recover economic benefit in litigation-circumstances that EPA considers would occur only rarely. The policy also permits enforcement officials to omit economic benefit from the penalty assessment when the benefit is negligible. While each regulatory program also has its civil penalty policy because of statutory differences, all programs establish economic benefit and gravity as the basis for penalties.

To determine economic benefit, EPA officials collect information on delayed capital **investment** avoided operations and maintenance expenses; and one-time, nondepreciated expenditures. To assist in the calculation itself, EPA's Office of Enforcement developed a computer model, known as BEN. According to its developer, the Program, which is available in all EPA regions, is easy and quick to use. The Office of Enforcement also provides training in its use.

Prior Reviews of Penalty Practices

In a series of 10 program reviews conducted between 1988 and 1990, GAO and EPA's Inspector General documented numerous cases in which *EPA regional* offices and states had not followed the agency's penalty policy and had assessed low penalties, or none at all, for significant violations. These reviews covered enforcement of EPA'S hazardous waste program under the Resource Conservation and **Recovery Act(RCRA)**; the **national** pollutant discharge permit program, the industrial pretreatment program, and the oil pollution prevention program under the Cle Water Act; and the stationary source air pollution program under the Clean Air Act-five programs altogether, covering 10 regions and 22 states. (A list of reports is provided in app. I.)

Following these and other internal reviews, *EPA* in 1989 identified enforcement as one of several areas within the agency particularly vulnerable to fraud, waste, and abuse because of the lack of management controls and the large dollar amounts involved. In its December 1990 repro to the President under the **Federal Managers' Financial Integrity** Act, the agency said that while penalty practices had been one of three problem areas within the enforcement program, it believed that activities undertaken in fiscal year 1990, such as greater headquarters focus on penalties in annual reviews of regional enforcement programs, would correct these deficiencies.

Overall, enforcement has received renewed attention under the current administration. **EPA Administrator, William Reilly, ranked enforcement among his** top five priorities for the agency when he took office. In 1990 the Office of Enforcement published a 4-year strategic plan that emphasized strong enforcement practices and several new initiatives dealing with improved information systems and inspection schemes, among other things. According to officials we interviewed, *EPA remains committed to a strong penalty policy* and continues to believe that penalties should be high enough to serve as a deterrent to violations and should remove the economic benefit of noncompliance.

Assessed Penalties Show Little Relationship to Economic Benefit

Although total penalties assessed by the agency increased in fiscal year 1990, the amounts, for the most part, still show little relationship to the economic benefit of the violations. This is true of the penalties assessed by EPA and, according to available data, of state penalties as well.

EPA Penalty Trends

According to EPA, total penalties assessed by the agency in all its programs amounted to \$61 million in fiscal year 1990, increasing from \$35 million in fiscal year 1989 and \$37 million in fiscal year 1988. Most of this increase—\$21 million of \$26 million—came from the toxic substances program, which increased its administrative penalties by over \$6 million, or 147 percent. In addition, \$15 million was assessed in one civil judicial case involving a toxic substances violation. (See app. II, fig. II.1.)

Within the four programs we examined, EPA provided data to us covering 685 cases that were concluded in fiscal year 1990. For these cases, EPA had initially requested penalties of \$66 million.¹ Following settlement negotiations or litigation, the penalty amounts were reduced to about \$28 million. In most of these cases, however, EPA has no measure of how much it should have assessed, at a minimum, because the agency did not calculate—or at least document—the economic benefit to the violator, which, in theory, should have been the minimum amount of the penalty.

Of the 685 cases concluded in fiscal year 1990, EPA was not able to report the economic benefit of the violation in 442 cases, or 65 percent of the total. (See app. II, fig. II2.) Within these undocumented cases, 163 also had no record of the initial penalty requested. In the remaining 279 cases, the initial penalties totaled almost \$20 million, which was reduced by 61 percent to less than \$8 million. While these reductions may have been allowable under the penalty policy, without documentation to support the initial penalties, the government has no way of knowing the minimum amount that it should have collected in these cases.

¹Based on 522 of the 685 cases that included both initial and final penalties. Because initial penalties may be revised during the discovery process, that is, the period in which additional information on the case is exchanged, we used the latest values computed in hazardous waste, water, and air cases. For the toxic substances program, officials said that initial penalties often represent the maximum amount the law allows, rather than economic benefit and gravity, which are generally lower.

Among civil judicial cases,² which generally represent the more serious violations, the incidence of documentation was relatively high, covering 89 percent of those cases. However, among administrative penalty cases, which comprise 90 percent of all enforcement cases, only about one in four cases had information on economic benefit in its files. (See app. II, fig. II.3.) In 85 percent of the cases in which economic benefit calculations were documented, the final assessed penalties were at least as great as the economic benefit. In the cases in which final penalties were below the economic benefit, the benefits not recovered totaled \$8 million. However, we did not conduct file reviews to determine whether these reductions were permissible exceptions to the penalty policy.

Among EPA Programs, the toxic substances program, which was unable to furnish us with data on economic benefit in any of these cases, had the greatest absence of documentation. Officials in the toxic substances program attributed the lack of documentation to what they said was negligible economic benefit involved in many toxic substances cases which are often record keeping violations. The hazardous waste program also had a large proportion of cases (88 percent), most of them administrative, for which no economic benefit value was documented. By contrast, all air program cases—all of them civil judicial cases³—contained documentation of economic benefit, as did 71 percent of water program violations. (See app. II, fig. II.4.)

State Penalties

According to GAO and EPA Inspector General reports, economic benefit was not routinely recovered in state and local penalties. In our 1990 review of enforcement in the stationary source air pollution program, we found that over half of the more than 1,100 significant violators that states and localities had identified in fiscal years 1988 and 1989 had paid no cash penalties at all. In another case, a facility that had failed to install required control equipment and had emitted excess air pollutants for more than 6 years was ultimately assessed a penalty of \$15,000. At the request, EPA's Enforcement Office calculated the economic benefit of

²Although all penalty cases examined here are civil cases, the term "civil" is used in order to distinguish these cases from criminal cases. B— administrative cases by nature under civil law, the term "civil" is commonly left off.

³EPA did not obtain comprehensive administrative penalty authority under Clean Air Act until the statute was amended in 1990.

"Air Pollution: Improvements Needed in Detecting and Preventing Violations" (GAO/RCED-90-1 Spet 27, 1990).

violation and found that it was, in fact, more than \$231,000-about 15 times more than the penalty imposed. The local air agency official explained that the assessed penalty was in keeping with the customary penalty for such violations.

In cases that we and others have reported on, repeated violations have occurred in the absence of penalties. In the above-mentioned air pollution violation case, 2 months after paying the \$15,000 penalty, the facility was found conducting unpermitted operations. In other cases, facilities that received no penalties not only continued to pollute but also eventually caused serious and expensive contamination problems, as illustrated by the following examples.

- I A wood preserving facility on the Chesapeake Bay repeatedly violated its wastewater discharge permit for 13 years with no penalty. The facility caused numerous environmental problems, including contamination of surface and groundwater, before being placed on the Superfund National Priorities List for cleanup, estimated to cost \$23 million. Despite the magnitude of the problems, the facility retained its permit for over 2 years after being declared a Superfund site.
- I Avtex Fibers violated its wastewater discharge permit at least 1,600 times over a 9-year period. EPA and the state of Virginia also cited the company for contaminating groundwater and emitting into the air 770 times the allowed levels per hour of carbon disulfide. Yet, according to the Virginia Assistant Attorney General and information in EPA files, Avtex never paid a fine. The plant remained open until November 1989 when the state of Virginia revoked Avtex's discharge permit because it was discharging PCBs (a toxic substance) into the Shenandoah River. Because of groundwater contamination, the plant was placed on the Superfund National Priorities List for cleanup, after which the plant owners filed for bankruptcy protection. While the full amount cannot yet be reliably estimated, taxpayers may ultimately have to bear the brunt of cleanup costs, which EPA's project officer for the site believes will be among the highest to date for Superfund sites.

In the Avtex case, competitors also charge they have been adversely affected by the absence of penalties. One of Avtex's competitors, a company in Tennessee, said that it had to make pollution control investments totaling more than \$30 million and that Avtex, which was not required to make such investments, was often able to underprice it in the rayon market.

Pressures to Reduce Penalties

According to both EPA headquarter and regional office officials, various pressures and differing views prevail within EPA regions that deter the agency from following the agency's penalty policy and recovering economic benefit. Some regional and program officials strongly endorse EPA's penalty policy and aim to carry it out. Others, however, choose to de-emphasize penalties in favor of working with a violator to obtain compliance because of a belief that this approach will bring a larger number of facilities back into compliance.

In addition, pressures to meet program targets for settled cases and limited budgetary resources encourage regional officials to settle cases quickly rather than continue to negotiate or pursue a case through a hearing or trial in order to obtain an appropriate penalty. According to some Office of Enforcement officials, officials may feel pressure to settle cases quickly just before the end of a fiscal quarter in order to boost statistics that are maintained on numbers of settled cases. Also, officials may feel constrained by limited resources from pursuing a case through a hearing or trial and may therefore choose to settle with violators for lesser penalty amounts. A continued reluctance to pursue high penalties can have a negative effect, however, as headquarters officials acknowledge: Once violators recognize that EPA is unlikely to take them to court, they are less likely to settle on terms favorable to the government. And in the long run this can undermine the goal of having penalties serve as a deterrent to violations.

State and local enforcement agencies are likewise subject to pressures that make them reluctant to follow a penalty policy based on recovering economic benefit. Local officials we have talked to were concerned that high penalties might jeopardize local business, result in unemployment, and dissuade businesses from locating in the state. For example, in our 1990 air program enforcement review, a local government official in North Carolina told us that he believed that placing economic benefit penalties on violators might place facilities in his state at a competitive disadvantage vis-a-vis businesses in areas that did not have a similar penalty policy. In a municipality we visited during our review of enforcement under the industrial wastewater pretreatment program,⁶ we found that no industrial users had been fined, taken to court, or subjected to any formal enforcement action. The town administrator believed it was more prudent to obtain the cooperation of the town's industry than to alienate it by escalating enforcement action--even

⁶Water Pollution: Improved Monitoring and Enforcement Needed for Toxic Pollutants Entering Sewers (GAO/RCED-89-101, Apr. 25, 1989).

though the town's major industry was repeatedly violating its effluent discharge limits.

Finally, some states have legal limits on the dollar amounts they can assess for penalties. Iowa state law, for example, prohibits administrative penalties of more than \$1,000 per day, as compared with caps of up to \$25,000 under federal statutes. According to EPA officials, state legislatures would be more likely to change such limits if EPA were to impose program requirements that necessitate removing the caps. The hazardous waste program, for example, Plans to Propose a rule to require states to raise caps to the \$25,000 level allowed under RCRA.

Oversight of Regional and State Penalty Practices Is Insufficient

Because of the pressures that work against its penalty policy at the regional and state levels, EPA's oversight of penalty practices is critical, particularly given the importance that the agency's top management places on the policy.

Headquarters Does Not Have Sufficient Information to Oversee Regional Penalty Practices

EPA headquarters reviews civil judicial cases more closely than it does administrative cases, but it does not have complete information on economic benefits for either type of case. Civil judicial cases, which make up about 10 percent of the caseload, are individually reviewed at Headquarters by EPA's Office of Enforcement, and we found that the pen-

assessments in the civil judicial cases we reviewed were well documented. However, individual review is time-consuming and labor-intensive, according to EPA. While it may be worthwhile and even necessary for other reasons, to undertake individual reviews for the relatively small number of civil judicial cases, such a review might be difficult to justify simply to check if economic benefit is calculated and assessed. Further, because the review is so detailed, reviewers may not be able to discern any overall patterns or trends among programs and regions. Finally, because reviewers are assigned to specific programs, no central office reviews information across all programs for general trends or inconsistencies.

The Enforcement Office has a central reporting system for its docket of civil judicial cases that permits a review of trends in penalty practice among programs and regions, but it records only the initial and final penalty assessments. No information on the minimum penalty to be collected—the economic benefit component—is included, nor is the size o

the gravity component, nor the reasons why initial penalties were reduced. Although the system was originally designed to include information on economic benefit and gravity components, these fields were removed from the system a number of years ago because regional officials often did not enter the data. According to the EPA official currently responsible for the system, not all regional and program enforcement officials were convinced of the need to collect and analyze the data, and the office of Enforcement officials at that time did not press the officials to do so.

Each of the regulatory program offices also maintains an automated data management system with information on administrative penalties in a little but these data bases do not track economic benefit. The program offices joined since last year by the office of Enforcement, review administrative penalty information during annual audits. However, these audits deal with many other aspects of enforcement besides penalties and, because of time and resource constraints, only a small percentage of cases are reviewed. Recently, however, the hazardous waste program has gone beyond these actions and directed regional offices to forward final penalty calculations and justifications for all administrative cases to headquarter for periodic review.

EPA Organizational Responsibilities for Enforcement Are Diffuse

Oversight is also made more difficult by the fact that the organizational responsibilities for enforcement at EPA are diffuse: 15 offices are responsible for either sitting or carrying out enforcement policies. During the 1970s, enforcement for all regulatory programs was centralized within headquarters in the Office of Enforcement headed by an assistant administrator, who was responsible for developing and overseeing enforcement Policies and Programs. At the regional level, a single division director, who reported to the regional administrator, was responsible for enforcement in all regulatory programs. The rationale for this structure was that enforcement cut across all programs and a consolidated enforcement office gave the function more focus.

In two reorganizations in the early 1980s, however, the agency moved responsibility for enforcement to the individual program offices. Thus for example, the Office of Water became responsible for not only writing regulations but also for enforcing them. These reorganizations left the Office of Enforcement with a core of legal staff but with little line authority over any of the program offices. Although critics assert that the reorganizations' goal was to weaken enforcement at a time when the agency was emphasizing voluntary compliance, the stated purpose was

to incorporate an enforcement presence in the program offices and give them responsibility for all elements of their programs. In addition, as part of an agencywide initiative to delegate responsibility to those nearest the source of pollution, each regional administrator was given responsibility for enforcement in his or her or her region. (See app. III for the current and former organizational structures for enforcement.)

As a result, today no one office is clearly accountable for penalty practices. The assistant administrator for enforcement remains responsible for setting agencywide enforcement policies but has no authority to compel the programs and regions to carry out these policies. The program assistant administrators are also responsible for setting enforcement policies, but these are only for their individual programs. For the most part, the policies are implemented by regional program officials who report directly to the regional administrators and receive guidance and oversight from the program administrators but have no formal connection to the Office of Enforcement.

Until recently, the regional counsels provided legal enforcement support to regional program officials but had no formal connection to the Office of Enforcement. However, in 1989, the administrator for enforcement was given the responsibility for annually rating the performance of the regional counsels on enforcement matters and for providing input to the deputy regional administrator's rating. In 1990, the assistant administrator for enforcement also proposed to return to a centralized enforcement structure in order to increase accountability, but the EPA Administrator declined to act on the proposal. The Administrator said that although the proposal had merit and might be reconsidered, enforcement in the agency was working well despite problems in some areas and that a reorganization might be too disruptive.

EPA has acknowledged that oversight of regional penalty practices has been a problem, and in its December 1990 report to the President describing efforts to correct material weaknesses, it outlined a series of completed corrective actions. The Office of Enforcement issued a memorandum to the regions in December 1989 rephasizing the need to adhere to its uniform civil penalty policy and to document the reasons for any reductions to initial penalties. The Office of Enforcement and program offices were also directed to pay more attention to penalty calculation and documentation in their reviews. Finally, attorneys were required to be trained in negotiation skills before leading settlement

negotiations. However, while these actions may emphasize the importance of the agency's penalty policy, they do not provide for comprehensive reviews or for a mechanism to follow through and ensure that regions are acting on this guidance.

EPA's Oversight of States Is Limited

EPA's oversight of state penalty practices is even more limited, largely because the agency has not required the states to adopt its own civil penalty policy. According to agency officials, it has been necessary to concentrate first on ensuring that states can meet more basic requirements, such as taking timely and appropriate enforcement actions, before requiring them to adopt EPA's economic benefit penalty policy. Instead, the agency's 1986 Policy Framework for State/EPA Enforcement Agreements simply recommends that state penalty policies include an economic benefit component. EPA argues that such policies provide greater consistency for similar violations, and, in general, a more equitable and legally defensible basis for determining penalty amounts. In addition, one state official we talked to noted that an economic benefit policy provides for a more equitable treatment of the regulated community within a state. However, in the 2 EPA regions we visited, only 13 of the 29 air, water, and hazardous waste authorized state programs have penalty policies that consider economic benefit, according to EPA Officials.

EPA is responsible for overseeing state penalty practices and has the authority to pursue its own enforcement action when authorized states are unable or unwilling to assess adequate penalties on their own. In an action called "overfilling," EPA can impose its own penalty for a violator in which a state assessed no penalty when one was required, or in which the penalty was "grossly deficient," considering all the circumstances of the case and the national interest. However, the criteria for "grossly deficient" are not clear and provide no concrete standards. EPA's state/federal enforcement policy framework states only that determining whether a penalty is grossly deficient is "a judgement call made on a state-by-state basis." As a result, regional officials told us they are often uncertain as to when overfilling is called for and ultimately use what is called the "laugh test"; that is, if a state penalty is so low as to lack credibility, it is considered grossly deficient. Other officials in one EPA region told us that they do not even review penalties for potential overfilling because of the absence of standards.

Although it has only recommended an economic benefit penalty policy to the states, EPA could require that states adopt such a policy as a condition of its approval of a state program. Under both the Clean Water Act and RCRA, EPA must determine that a state program provides for adequate enforcement before it will approve the program. EPA regulations currently define an adequate enforcement Program as one that includes penalty authority, but EPA could change its regulations to require that an economic benefit policy be part of a state's enforcement program. EPA has similar review and approval authority over state implementation plans under the Clean Air Act, and we believe it can use this authority to require economic benefit penalty policies in state air programs.

We have, in fact, recommended that EPA impose such a requirement in both the air and hazardous waste programs. In our 1990 report on EPA's enforcement of the stationary air pollution control program we called for EPA to require states to include an economic benefit penalty policy in the new implementation plans that would be required under the 1990 Clean Air Act Amendments. The agency has reacted favorably to our recommendation and is awaiting an opinion from its Office of General Counsel as to the agency's authority.

We made a similar recommendation in a 1988 report on enforcement of the hazardous waste program. However, according to a program official, the agency chose not to require states to adopt an economic benefit penalty policy because it was concerned about the effect of adding this requirement to others it is proposing to place on state enforcement programs. In addition, the agency was concerned that states would choose not to change their legislation to meet such a requirement and would therefore lose their RCRA authorization. If this occurred, EPA would then have to administer the hazardous waste programs in these states, which it said it was reluctant to do.

Another way in which EPA can attempt to change state penalty practices is through its state program grants. RCRA, the Clean Water Act, the Clean Air Act, and Other statutes that provide for state delegation authorize EPA to provide grants to the states to run their programs. In theory, EPA can use a grant to bring about a change in a state program by attaching conditions to it. In those states that are willing to accept such a condition, requirement for an economic benefit penalty policy may be imposed relatively quickly-as part of an annual grant negotiation. By

⁶Hazardous Waste: Many Enforcement Actions Do Not Meet EPA Standards (GAO/RCED-88-140, June 8, 1988).

contrast, bringing about changes in state programs through regulatory requirements can take from 3 to 5 years or, in the case of state implementation plans from 5 to 10 years, according to EPA officials.

As for states' adherence to economic benefit penalty policies, EPA now requires states to report quarterly on enforcement actions taken, and the agency reviews state enforcement actions to ensure that the states are meeting criteria for timeliness and appropriateness. EPA could therefore monitor the states' implementation of its penalty policy by having them provide information on penalty assessments, including economic benefits, along with other enforcement data.

While EPA would like to see states adopt an economic benefit policy and have argued strongly in favor of such a move, officials in the Office of Enforcement and in the water and hazardous waste programs are concerned about actually compelling states to do so. Their principal concern is that states will relinquish authority for their programs to EPA, a burden that these officials believe would be too difficult to assume.

Conclusions

EPA's civil penalty policy, in our view, is a reasonable one. The policy is simple to understand, treats all regulated entities fairly and comparably, can be applied in any state or region, and allows for exceptions when circumstances call for them. Moreover, having a standard on which to base penalties permits management oversight of numerous decisions with important monetary consequences. Although other forms of sanctions may also be effective, such as permit revocation, there will always be a role for penalties to play. And, as long as penalties are used, we believe that there ought to be some reasonable and consistent criteria for determining their size.

EPA's top management remains committed to the civil penalty policy. It has taken the first step in ensuring adherence to this policy by emphasizing its importance to its regional Offices and, in particular, by emphasizing the importance of including documentation of penalty assessments in case files. We are skeptical, however, that these actions will be enough. Without evidence of the sustained interest of headquarters, EPA regional offices and states have little reason to make changes in their customary practices and beliefs. In order for its penalty policy to be successfully implemented over the long run, EPA needs to hold states and regions accountable for carrying out the policy by monitoring their performance. While the hazardous waste program has initiated such a

effort on its own, monitoring needs to transcend individual program efforts to cover agency activities overall.

EPA already has the basis for such a monitoring system in its central penalty requiring system. The system, in fact, was originally designed to contain information on economic benefit and gravity components. While this system will not eliminate the need for individual file reviews for civil judicial cases, it would make overnight of administrative cases much easier. Moreover, it would allow the identification of any trends in regional or program penalty practices in civil judicial cases. When there are legitimate reasons for not including an economic benefit component as part of a penalty calculation, such as when the benefit is negligible, these can be indicated in the system. In this way, a monitoring system would provide the necessary internal controls for management to monitor agency performance and make any necessary improvements. Given the large dollar amounts involved in penalty collections, strengthening internal controls is crucial to avoid fraud, waste, and abuse.

In addition to needing better information EPA needs to have clearer lines of responsibility for taking any corrective action indicated by the information. We would not necessarily advocate a reorganization to remedy this situation, however. While consolidation of enforcement responsibilities may be needed to remedy the diffuse responsibility for enforcement within the agency, the need for and desirability of such a move should be decided on the basis of more than just implementation of penalty policy.

As for state penalty practices, we believe that EPA has not only the authority but also sound reasons for requiring States to have a penalty policy that requires recovery of economic benefit. With states responsible for the large majority of enforcement actions, any policies that are set for federal practices alone will ultimately have little effect. A basis for assessing penalties, economic benefit ensures that regulated facilities are penalized in the same way regardless of which state they are in whether they are regulated by a state or federal agency. An economic benefit policy for states would also provide EPA regions with a standard by which to judge whether a state penalty is adequate and whether overfiling is warranted. We recognize that some now face legal constraints that may keep them from adopting such a policy, but it seems unlikely that changes will occur in those states unless there is some outside requirement for it. Using state grants as a vehicle for change may be effective as an interim step where states are inclined to

change their policies. However, EPA can only compel adherence by changing state program requirements.

As stated in previous reports, We appreciate EPA's concerns about the sensitivity of its relationships to the status. We recognize that states could choose to return responsibility for regulatory programs to the federal government and that such a move could impose a considerable burden on EPA. However, if EPA's oversight role is to be taken seriously, the agency has to be prepared to assume this burden when there is a reason.

Once EPA requires such a penalty policy, it will have to monitor state penalty assessments to ensure that the policy is carried out. This information can be incorporated into existing state enforcement reporting system requirements and would allow both EPA and the states to be aware of how the states were doing.

**Recommendations to
the Administrator,
EPA**

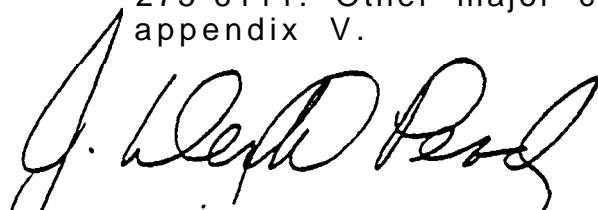
To institute the internal controls necessary to ensure that a uniform civil penalty policy is followed, we recommend that the EPA Administrator

- require that EPA's regional offices provide information on administrative penalties for the Office of Enforcement's penalty reporting system so that they include, for civil judicial and administrative cases, initial calculations of economic benefit and gravity, subsequent revisions in the calculations, reasons for penalty reductions, and final penalty amounts; identify (once the reporting system has been modified) the individual offices within the agency that will be responsible for monitoring penalty practices and for taking any corrective actions indicated;
- require states, in their federally delegated air, hazardous waste, and water programs, to adopt economic benefit policies that are based on EPA's uniform civil penalty policy; and, in the interim, require economic benefit policies as conditions of annual program grants; and
- require states, once they have adopted economic benefit policies, to report final calculations of economic benefit and gravity, subsequent revisions to these calculations, reasons for penalty reductions and final penalty amounts as part of the enforcement information they now provide.

Our work was conducted from August 1990 through May 1991 in accordance with generally accepted government auditing standards.

Appendix IV describes our methodology in detail. As requested, we did not obtain official agency comments on a draft of this report. However, we discussed the information in this report with EPA officials, who generally agreed with the factual information, and we made changes appropriate. Unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will make copies available to the Administrator, Environmental Protection Agency; the Director, Office of Management and Budget and other interested parties.

This work was prepared under the direction of Rich Director, Environmental Protection issues, who can be reached at (202) 275-6111. Other major contributors to this report are appendix V.



J. Dexter Peach
Assistant Comptroller General

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Abbreviations

EPA	Environmental Protection Agency
IG	Inspector General
GAO	General Accounting Office
NPDES	National Pollutant Discharge Elimination System
PCBs	polychlorinated biphenyls
POTW	publicly owned treatment works
RCED	Resources, Community, and Economic Development Division
RCRA	Resource Conservation and Recovery Act

Listed below are reports issued by GAO and EPA'S Inspector General (I between 1988 and 1990 covering penalty policies and practices. Although most of these reports addressed Other enforcement issues Well the summaries below cover only Penalty issues.

General (Across EPA Programs)

Capping Report on the Computation Negotiation, Mitigation, Assessment of Penalty Under EPA Programs (EPA-IG EIG8E9-06-0087. 9100486, Sept 27, 1989)

This report summarized previous audits of penalties under the Clean Water Act and the Resource Conservation and Recovery Act. The IG concluded that many EPA regions and states inadequately calculated penalties, reduced the proposed penalties excessively with little or no documentation and, in many cases, neglected to recover violators' economic benefits of noncompliance. In some cases penalties were reduced in excess of 90 percent with little or no documentation to support the reductions. Although EPA does not require states to follow ERA's penalty policy, the IG report noted that, in states did not properly administer their own penalty policies. The IG also reported that EPA did not have aggregate administrative judicial penalty information and therefore could not adequately judge the success of its enforcement program.

Air Quality

Air Pollution Improvements Needed in Detecting and Preventing Violations (GAO/RCED-90-155, Sept. 27, 1990)

GAO examined EPA's efforts to control air pollution from state sources, focusing on Regions 3, 4, and 9, and eight local programs within these regions. GAO found that State programs had assessed penalties in fewer than half cases of violations in fiscal years 1988 and 1989. Of the eight programs reviewed, none regularly sought to recover economic benefit penalties. Some states continue to emphasize compliance and technical assistance in their enforcement efforts, rather than penalties. EPA rarely takes its own direct enforcement action when a state fails to do so because of, among other reasons, the high cost and political difficulty in using the federal authority.

Review of Region 5's Stationary Source of Air Pollution Compliance and Enforcement Program (EPA-IG EIK67-05-0449-80743. Mar. 11. 1988)

The EPA Inspector General reviewed 29 case files of stationary sources in Region 6 and found that 12 of the 18 significant cases were settled with penalties. Only 4 of these 12 Cases correctly Calculated and documented the penalty amount. The collected penalty exceeded the violator's economic benefit in only two of the nine applicable cases. The other seven violators gained an economic benefit from noncompliance.

Consolidated Report on EPA's Administration of the Asbestos National Emission Standard for Hazardous Air Pollutants (NESHAP) (EPA-IG EIGM7-06-0671-80821, Mar. 24, 1988)

EPA's Inspector General reviewed inspection and enforcement actions of Regions 4, 5, and 9 the delegated state and local agencies within those regions. The IG found that EPA regions and state and local agencies were generally not issuing violations or resolving violations with penalties. When penalties were recommended, amounts were generally not sufficient to deter violations or remove the economic benefit of noncompliance.

Water Quality

Inland Oil Spills: Stringent Regulation and Enforcement Needed to Avoid Further Incidents (GAO/RCED-89-65, Feb. 22 1989)

Following the large 1988 oil spills by the Ashland Oil Co., near Pittsburgh and the Shell Oil Company near the San Francisco Bay, GAO reviewed efforts underway in EPA Regions 3, 5, 6, and 9, to determine how EPA was enforcing federal regulations intended to prevent oil spills under the Clean Water Act. GAO found that EPA does not have national guidance on imposing fees for violations of EPA's Oil Pollution Prevention regulations. Although EPA's data indicate that the rate of noncompliance may be high, the regions rarely impose fines. Seven of the 10 EPA regions have never levied penalties against violators of the Oil Pollution Prevention regulations.

Water Pollution Improved Monitoring and Enforcement Needed for Toxic Pollutants Entering Sewers (GAO/RCED-89-101, Apr. 29 1989)

EPA's National Pretreatment Program requires industries to treat their wastewater before discharging it into publicly owned treatment works (POTW). From a survey sent to a stratified random sample of 502 of the approximately 1,500 POTWs participating in the national pretreatment program, GAO found that until 1988, EPA emphasized implementation rather than enforcement in its pretreatment program. About 60 percent

of the porws GAO surveyed issued notices of violations, but only about 1 percent imposed administrative [ema]toes. POTWs find it politically difficult to impose sanctions on facilities that employ local workers and pay local taxes. Both EPA and regional officials acknowledged that they had limited oversight and enforcement of POTWs who do not comply with their own enforcement responsibilities.

**Report of Audit on the Management of the Chesapeake Bay Program
Joint Source Pollution Program (EPA-IG EI98-03-0208-9100467, Sept. 11, 1998)**

The Chesapeake Bay Agreement between EPA and the states surrounding the Bay is intended to reduce toxic pollutants entering the Bay. EPA's Inspector audited the Chesapeake Bay Program and found that EPA Region 3 and Maryland, Pennsylvania and Virginia have not effectively enforced the Clean Water Act against polluters of the Chesapeake Bay. The states assessed insignificant penalties or no penalties against major long-standing violations but EPA did not fulfill its enforcement oversight responsibility and take its own enforcement action to obtain a larger penalty.

Consolidated Report on Audit of the National Pollutant Discharge Elimination System Permit Enforcement Program (EPA-IG EI98-01-0200-010016422, Jan. 4, 1990)

EPA's National Pollutant Discharge Elimination System (NPDES) requires wastewater dischargers to have permits and for EPA and states to effectively monitor compliance and enforce permit requirements. This report summarizes the results of audits of EPA Regions 1, 2, 4, and 5, including 11 selected cases from each state. The IG found that the EPA region and the delegated states had not assessed penalties in accordance with EPA's civil penalty policy and had not adequately documented penalty assessments. In 46 of the 69 civil cases reviewed, the penalty assessment did not recover the economic benefit of noncompliance. In Regions 2 and 5, the IG found inconsistencies between penalties assessed against municipal and industrial facilities for similar violations.

Hazardous Waste

Hazardous waste Many Enforcement Actions Do Not Meet EPA Standards (GAO/RCED-88-140, June 8, 1988)

GAO reviewed EPA and state RCRA cases in Regions 2, 5, and 6, and two states within each of these regions. GAO found that penalties assessed

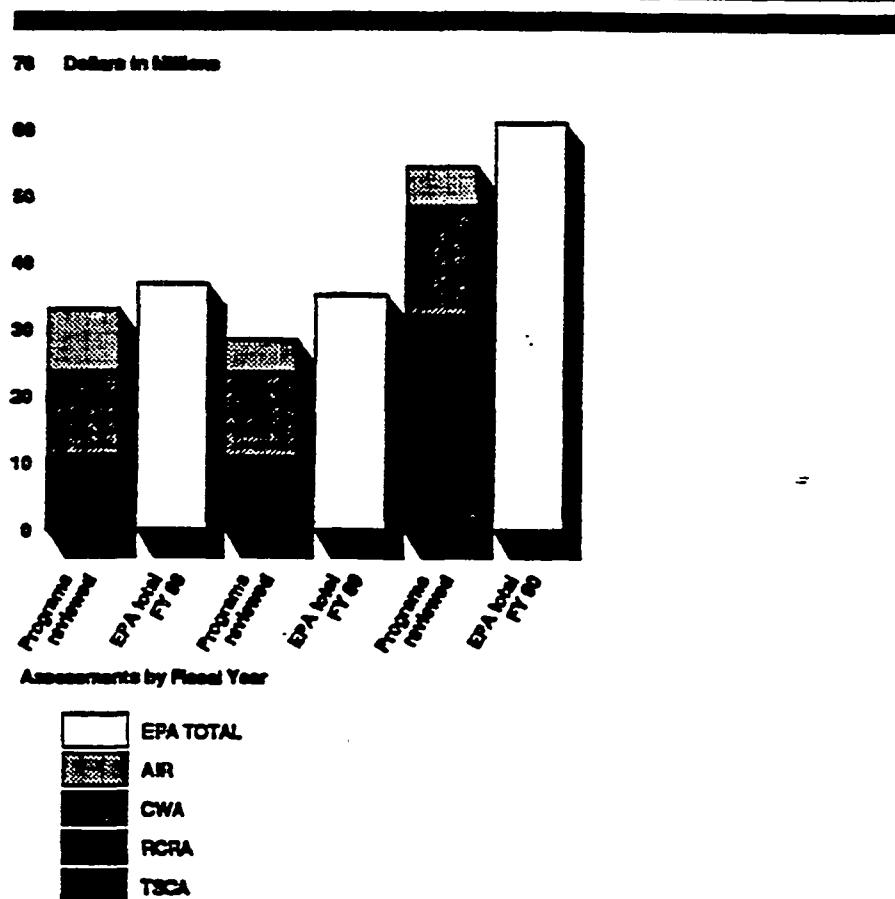
EPA and five states may not be large enough to offset the economic benefits of noncompliance and are not documented consistently. In the three EPA regions reviewed, GAO examined 31 of the 40 high-priority enforcement cases. The lack of documentation in 29 of these cases prevented GAO from determining whether the regions followed the RCRA penalty policy and adequately considered the economic benefit of noncompliance. GAO also reviewed 35 of the 40 high-priority enforcement cases in 4 states. In three of the states, we found no evidence to suggest that the economic benefit of noncompliance adequately considered in the proposed penalty. Texas the only state that consistently documented penalty calculations and considered economic benefit in all 14 of its high-priority cases. However, the maximum penalty amount allowed the Texas penalty policy may not produce penalties large enough to offset the economic benefit of noncompliance.

**Consolidated Report on Review of EPA'S Controls Over Administrative
Penalties Under the Enforcement Program (EPA-1G-EIG68-00-0188-
9100479, Sept. 18,1989)**

This report summarizes audits of penalty assessments and negotiations in Regions 1,4,6,8, and 9. The IG found that these EPA regional offices did not consistently adhere to national penalty policies and procedures for KPA violations. The IG'S Office sampled 20 administrative RCRA cases, examining 4 in each of the regions reviewed. The IG found that in the majority of cases the EPA regions did not adequately compute and assess penalties against RCRA violation to reflect either the seriousness of the violation, the duration of noncompliance, or the economic benefits of noncompliance. Proposed penalty were insufficiently documented and excessively mitigated.

Data on EPA Penalties

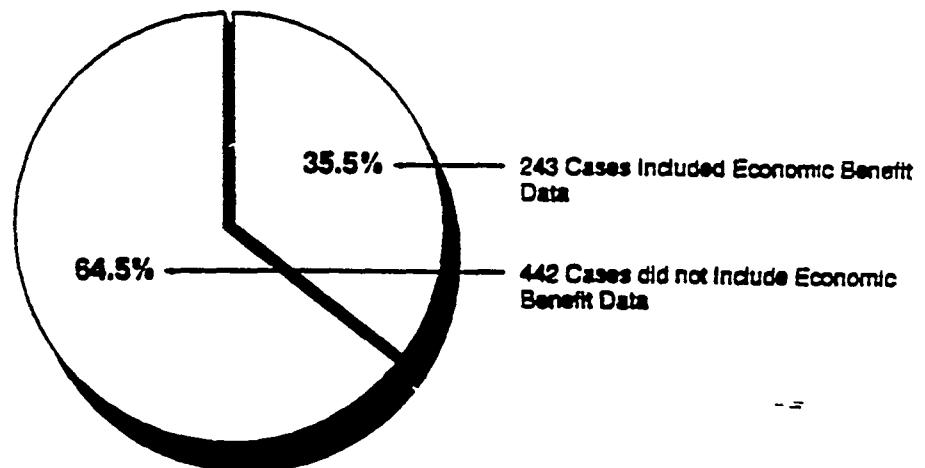
Figure II.1: EPA Penalty Assessments in Fiscal Years 1988-90, by Program and Agencywide



Note: Programs reviewed: stationary source program under the Clean Air Act; national permit discharge elimination system and pretreatment programs under the Clean Water Act; hazardous waste treatment, storage, and disposal under the Resource Conservation and Recovery Act, and toxic substances control program under the Toxic Substances Control Act.

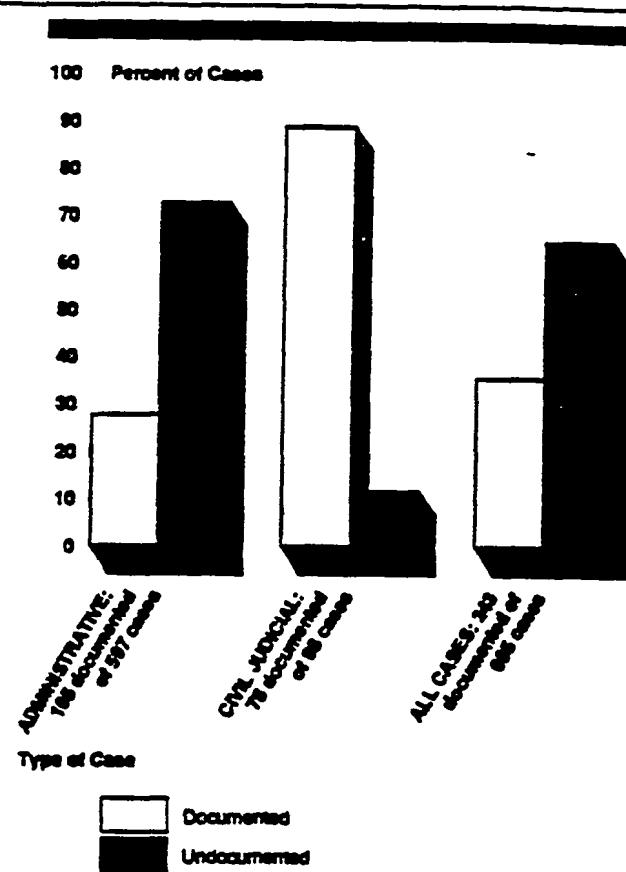
Source: EPA data.

Figure II.2: Documentation of Economic Benefits in Cases Reviewed



Source: EPA data on 685 cases concluded in fiscal year 1990 under four programs reviewed.

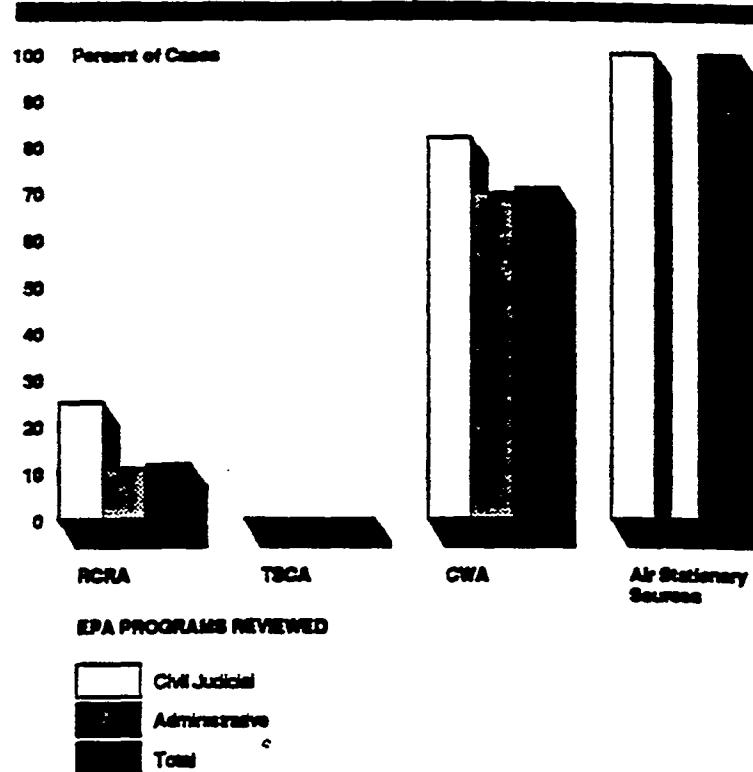
Figure II.3: Percentage of Cases in Which Economic Benefits of Noncompliance Were Documented, by Type of Case



Source: EPA data on 685 cases concluded in fiscal year 1990 under four programs reviewed.

Appendix II
Data on EPA Penalties

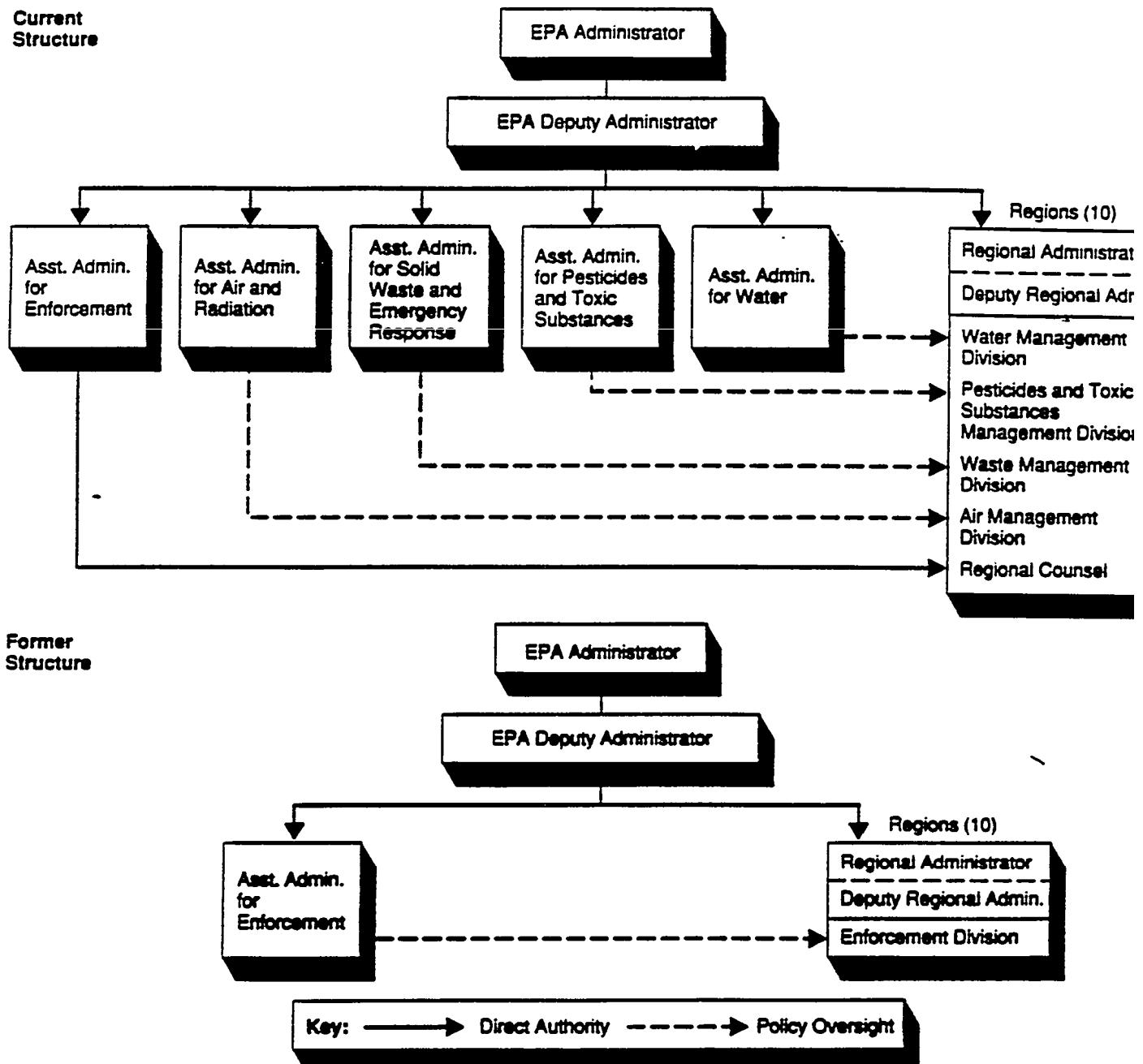
Figure II.4: Percentage of Cases in Which Economic Benefits of Noncompliance Were Documented, by Program



Note: The air program did not conclude any administrative cases in fiscal year 1990. The toxic substances program did not supply information on economic benefit for any cases.

Source: EPA data on 86 civil judicial and 597 administrative cases concluded in fiscal year 1990.

Current and Former Organizations With Responsibility for Enforcement



Scope and Methodology

We focused our review on penalty practices carried out under the Clean Air Act Stationary Source Program, the Clean Water Act National Pollutant Discharge Elimination System and National Pretreatment Program, the Resource Conservation and Recovery Act (RCRA) Hazardous Waste Treatment, Storage, and Disposal Program, and programs under Title I of the Toxic Substances Control Act. We chose these programs because together they accounted for over 80 percent of all penalties EPA collected during fiscal years 1988 through 1991. In addition, prior GAO and EPA Inspector General reports focused on weaknesses in these programs. The programs we reviewed are described below.

- Stationary Source Air Pollution Program: EPA and states monitor emissions at over 30,000 stationary air pollution sources including electric utilities, factories, and refineries. States issue construction permits designed to restrict emissions. Major stationary sources are responsible for 44 percent of all air pollution emissions.
- The Clean Water Act National Pollutant Discharge Elimination System: EPA or authorized states issue permits to restrict the amount of pollutants that a municipal or industrial facility can discharge into U.S. waters. About 48,400 industrial and 15,300 municipal dischargers are regulated under this program.
- The Clean Water Act National Pretreatment Program requires industries that discharge wastes into the nation's municipal sewage treatment facilities to "pretreat" their wastes prior to discharge. Approximately 1,500 local treatment plants are required to establish and enforce pretreatment programs for industrial users in order to remove pollutants from industrial waste that may interfere with the treatment process, damage the facilities, or pass through the facility into receiving waters.
- RCRA Hazardous Waste Treatment, Storage, and Disposal Program: EPA or authorized states issue permits to any person or company owning or operating a facility that treats, stores, incinerates, or disposes of hazardous waste. About 3,000 regulated facilities manage 275 million metric tons of hazardous waste annually.
- The Toxic Substances Control Act of 1976, Title I, authorizes EPA to control the risks associated with more than 65,000 commercial chemical substances and mixtures in the United States. Under the act, EPA requires companies to test selected existing chemicals for toxic effects and requires the agency to review most new chemicals before they are manufactured. To prevent unreasonable risk, EPA may require companies to use several precautions, such as hazard-warning labels or outright bans on the manufacture or use of especially hazardous chemicals.

To determine the current status of EPA'S penalty practices across programs and regions, we obtained data on penalties from each of the EPA offices in charge of these programs and from the Office of Enforcement. From each program office, we requested the initial calculations of gravity (the level of environmental harm) and economic benefit, subsequent recalculations, and the final assessed penalties for all administrative and civil judicial cases with a proposed monetary penalty concluded during fiscal year 1990. EPA officials obtained these data from individual case files maintained in the regions because program data bases did not contain all the needed information. However, officials did not provide information on all fiscal year 1990 cases because other EPA regions and offices were using some case files, therefore, they were not readily available at the time of our request. We did not verify any of the information provided.

We were not able to obtain data on penalty trends in the states because EPA does not collect data on state penalties, and the information was not easily accessible from the states. We therefore relied on information on specific cases reviewed in earlier GAO and EPA IG reports.

To understand the reasons underlying observed penalty trends, we interviewed Office of Enforcement and program enforcement officials at EPA headquarters and reviewed applicable penalty policies, reports, and other documentation. We also used EPA penalty data to choose two regions that seemed to represent widely differing penalty practices. In these regions, 5 and 7, we interviewed program enforcement officials and regional counsel representative and reviewed pertinent documentation. We conducted telephone interviews with selected state officials on the steering Committee on the State/Federal Enforcement Relationship and interviewed officials at the Department of Justice. We also analyzed 10 prior GAO and EPA Inspector General reports issued between 1988 and 1990 that focused on penalties. (See app. I for a listing of these reports.)

Our work was conducted primarily from August 1990 through May 1991 in accordance with generally accepted government auditing standards. We discussed the information contained in the report with EPA officials who generally agreed with the factual information in this report and included their comments where appropriate. However, as requested by the committee staff, we did not obtain official EPA comments on a draft of this report.

Major Contributors to This Report

Resources,
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Economic
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Office of General
Counsel

Doreen Stolzenberg Feldman, Senior Attorney

Recordkeeping requirements for owners or operators of hazardous waste facilities include record maintenance of all hazardous wastes handled; copies of waste disposal locations and quantities; operating methods; techniques and practices for treatment, storage, or disposal of hazardous waste; contingency plans; financial requirements; personnel training documents; and location, design, and construction of facilities.

Burden statement: The public reporting burden for this collection is estimated to average 73 hours per response and includes all aspects of the information collection, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The estimated annual recordkeeping burden is 18 hours per recordkeeper.

Respondents: Owners and operators of TSDFs.

Estimated Number of Respondents: 4,443.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 404,850 hours.

Frequency of Collection: On occasion. Send comments regarding the burden estimate, or any other aspect of this collection of information, including suggestions for reducing the burden, to: Sandy Farmer, U.S. Environmental Protection Agency, Information Policy Branch (PM-223Y), 401 M Street, SW., Washington, DC 20460, and Jonathan Gledhill, Office of Management and Budget, Office of Information and Regulatory Affairs, 725-17th St., NW., Washington, DC. 20503.

Dated: December 2, 1991.

Paul Lapaley, Director,

Regulatory Management Division:

[FR Doc. 91-29738 Filed 12-11-91; 8:45 am]

BILLING CODE 6560-00-48

[FRL-4039-9]

Control Techniques Guideline Document: Reactor Processes and Distillation Operations in the Synthetic Organic Chemical Manufacturing Industry

Agency: Environmental Protection Agency (EPA).

Action: Release of a draft control techniques guideline (CTG) for public review.

SUMMARY: A draft CTG document for control of volatile organic compound

(VOC) emissions from reactor processes and distillation operations in the synthetic organic chemical manufacturing industry (SOCMI) is available for public review and comment. This information document has been prepared to assist States in analyzing and determining reasonably available control technology (RACT) for stationary sources of VOC emissions located within certain ozone national ambient air quality standard nonattainment areas.

DATES: Comments must be received on or before February 10, 1991.

ADDRESSES: Comments. Comments should be submitted (in duplicate if possible) to: Central Docket Section (LE-131), Attention: Docket No. A-91-38, U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Control techniques guideline. Copies of the draft CTG may be obtained from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number (919) 541-2777.

FOR FURTHER INFORMATION CONTACT: Mr. Robert Rosensteel, (919) 541-5608, Emissions Standards Division (MD-13), Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The Clean Air Act Amendments of 1990 mandate that State Implementation Plans (SIPs) for certain ozone nonattainment areas be revised to require the implementation of RACT to limit VOC emissions from sources for which EPA has already published a CTG or for which it will publish a CTG between the date the amendments are enacted and the date an area achieves attainment status. Section 172(f)(1) requires that nonattainment area SIPs provide for the adoption of RACT for existing sources. As a starting point for ensuring that these SIPs provide for the required emissions reduction, EPA has defined RACT as "the lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility. For a particular industry, RACT is determined on a case-by-case basis, considering the technological and economic circumstances of the individual source category" (44 FR 53761).

The CTG documents are intended to provide State and local air pollution authorities with an information base for proceeding with their own analysis of RACT to meet statutory requirements. These documents review existing

information and data concerning the technical capability and cost of various control techniques to reduce emissions. Each CTG document contains a recommended "presumptive norm" for RACT for a particular source category based on EPA's current evaluation of capabilities and problems general to the source category. However, the "presumptive norm" is only a recommendation. Where applicable, EPA recommends that regulatory authorities adopt requirements consistent with the presumptive norm level, but authorities may choose to develop their own RACT requirements on a case-by-case basis, considering the economic and technical circumstances of the individual source category.

This CTG addresses RACT for control of VOC emissions from reactor processes and distillation operation processes in the SOCMI. The SOCMI is a large and diversified industry that produces hundreds of major chemicals through a variety of chemical processes. Reactor processes are those in which one or more substances are chemically altered to form one or more new organic chemicals. (This definition excludes processes employing air oxidation or oxygen enriched air oxidation processes to produce an organic chemical.) Distillation processes separate one or more feed streams (i.e., materials going into the process unit) into two or more product streams (i.e., materials leaving the process unit). The chemicals produced via reactor processes and distillation operations are listed in the CTG.

Dated: December 5, 1991.

Michael Shapiro,

Acting Assistant Administrator for Air and Radiation

[FR Doc. 91-29738 Filed 12-11-91; 8:45 am]

BILLING CODE 6560-00-48

[FRL-4039-4]

EPA Policies Regarding the Role of Corporate Attitude, Policies, Practices, and Procedures, in Determining Whether to Remove a Facility From the EPA List of Violating Facilities Following a Criminal Conviction

Agency: Environmental Protection Agency.

ACTION: Policy statement.

SUMMARY: EPA clarifies its policy concerning the role of corporate attitude, policies, practices, and procedures in determining whether, in mandatory contractor listing cases, the condition giving rise to a criminal conviction has

been corrected. Section 806 of the Clean Air Act and section 506 of the Clean Water Act require correction of the condition giving rise to the conviction as a prerequisite for removal of a facility owned operated, or supervised by a convicted person from the EPA List of Violating Facilities ("the List"). The purposes of this policy statement are to inform the public and the regulated community, thereby facilitating greater compliance with environmental standards: to formally restate criteria applied in EPA contractor listing cases over the past two years and to provide EPA personnel with a readily available summary of EPA policies which will enable them to evaluate contractor listing cases.

FOR FURTHER INFORMATION CONTACT Jonathan S. Cole, Chief, Contractor Listing program Office of Enforcement United States Environmental Protection Agency, Room 112 NE Mall (LE-133), 401 M St., SW., Washington, DC 20480. Telephone 202-280-8777.

SUPPLEMENTARY INFORMATION: SECTION 306 of the Clean Air Act (42 U.S.C. 7401 et seq., as amended by Pub.L. 91-804 and Pub.L. 101-548), and section 508 of the Clean Water Act (33 U.S.C. 1251 et seq., as amended by Pub.L. 92-500), and Executive Order 11738, authorized EPA to bar after appropriate Agency procedures) facilities which have given rise to violations of the Clean Air Act (CAA) or the clean Water Act (CWA) from being used in the performance of any federal contract grant, or loan. On April 16, 1975, regulations implementing the requirements of the statutes and the Executive Order were promulgated in the Federal Register (see 40 CFR Part 15, 40 FR 171244 April 11, 1975, as amended at 44 FR 6911, February 5, 1979). On September 5, 1985, revisions to those regulations were promulgated in the Federal Register (see 50 FR 38188, September 5, 1985). The regulations provide for the establishment of a List of Violating Facilities which reflects those facilities ineligible for use in nonexempt federal contracts, grants, loans, subcontracts, subgrants, or subloans.

Facilities which are placed on the EPA List of Violating Facilities are also listed by the General Services Administration (GSA) in its monthly publication, "Lists of Parties Excluded From Federal Procurement or Nonprocurement Programs," which is also updated daily by GSA.

This Federal Register Notice sets forth certain EPA policies which will be applied when facilities which have been placed on the List of Violating Facilities request to be removed from that list.

List of Subjects in 40 CFR Part 15

Administrative practice and procedure Air pollution control. Government contracts, Grant programs environmental protection Loan programs-environmental protection Reporting and record keeping requirements, Water pollution control.

EPA Policy Regarding the Role of Corporate Attitudes, Policies, Practices, and Procedures in Determining Whether To Remove a Facility From the EPA List of Violating Facilities Following a Criminal Conviction

I. Introduction

This guidance memorandum clarifies EPA policy concerning the role of corporate attitude, policies, practices, and procedures in determining whether, in mandatory contractor listing cases, the condition giving rise to a criminal conviction has been contacted. Section 306 of the Clean Air Act ("CAA") and section 506 of the Clean Water Act ("CWA") require correction of the condition giving rise to the conviction as a prerequisite for removal of a facility owned, operated, or supervised by a convicted person from the EPA List of Violating Facilities ("the List").

II. Background

In 1980, EPA formally recognized that the condition leading to a conviction under section 369(c) of the CWA or section 113(c) of the CAA could include a convicted environmental violator's corporate attitude policies, practices, and procedures regarding environmental compliance. In the Matter of Valmont Industries, Inc., (ML Docket No. 07-89-L068 Jan. 12, 1990) ("valmont"). In Valmont the decisions of both the Assisted Administrator for Enforcement (AA) and the EPA Case Examiner established the principle that the presence of a poor corporate attitude regarding compliance with environmental standards thus creating a climate facilitating the likelihood of a violation, may be part of the condition giving rise to the conviction which must be corrected prior to removal of the facility from the List. 40 CFR 15.20

Valmont was convicted of crimes of falsification and deception. The AA determined that not only was Valmont required to correct the physical conditions which led to its conviction

The term "corporate attitude" refers to all organizational defendants not only to incorporated entities.

Although discrepancy listing is outside the scope of this guidance evaluation of corporate attitude, policies, practices, and procedures may be applied appropriately in discretionary listing cases as well.

but that it also was required to demonstrate that it had implemented appropriate corporate policies, practices, and procedures, designed to ensure that the mere appearance of compliance with environmental standards was not put above actual compliance with those standards. The Case Examiner later affirmed the use of the corporate attitude standard in determining whether the condition leading to listing has been corrected.

Following Valmont, EPA has applied the corporate attitude test in other cases where facilities have requested removal from the List, including cases involving knowing or negligent conduct, not involving deliberate deception. See, Colorado River Sewage System Joint Venture, (ML Docket No. 09-89-L047, August 20, 1991); Zarcon Corp. (ML Docket No. 09-89-L058, Aug. 1, 1990); Sellen Construction Co. (ML Docket No. 10-89-L073, June 13, 1990). This memorandum clarifies the extent to which corporate attitude may be a relevant factor in cases involving knowing or negligent criminal conduct, which does not involve willful falsification or deception. It also clarifies the criteria which will be applied by EPA in determining whether the condition giving rise to a conviction has been corrected in a given case.

The purposes of this guidance are to inform the public and the regulated community, thereby facilitating greater compliance with environmental standards; to formally restate criteria applied in EPA contractor listing cases over the past two years; and to provide EPA personnel with a readily available summary of EPA policies which will enable them to evaluate contractor listing cases.

III. Scope of Application

The corporate attitude, policies, practices, and procedures of a listed facility's owner, operator, or supervisor will always be relevant when a facility that has been listed as the result of a criminal conviction requests removal from the List. How significant a factor the corporate attitude, policies, practices, and procedures will be depends upon the degree of intent involved in the violation at issue. The degree of intent shall be determined (for purposes of removal from the List) by the AA,³ with reference to the facts of

³ The Assistant Administrator will, as in all contractor listing removal cases, give considerable weight to the recommendations of the EPA Region in which the listed facility is located.

and the nature of the conduct involved in each case. This shall not be determined solely by the nature or title of the crime,⁴ or by the terms or language contained in any plea agreement.

In every case involving fraud, concealment, falsification, or deliberate deception, proof of change of corporate attitude must be demonstrated over an appropriate and generally substantial period of time, commensurate with the seriousness of the facts involved in the violation(s) (see section IV).

In most cases involving knowing misconduct, proof of change of corporate attitude must also be demonstrated over an appropriate period of time, commensurate with the seriousness of the facts involved in violation(s) (even if there was not affirmative fraud or concealment). There may be some extremely rare cases in which knowing conduct (not involving affirmative fraud or concealment) may be deemed to be relatively minor. In such rare cases, proof of change of corporate attitude may not be a significant factor.

In cases involving criminal negligence, proof of change in corporate attitude may be significant as it relates to ensuring prevention of further negligent violations. (E.g., in a negligent discharge case, proof of change of corporate attitude may be demonstrated by educating and training employees on proper treatment and disposal requirements and practices). In cases of serious negligence,⁵ more significance may be placed on demonstrating proof of change of corporate attitude, before a facility will be removed from the List. In other cases of negligent violations,⁶ a limited set of minor violations may exist which constitute criminal conduct resulting in conviction, but in which minimal significance will be placed on demonstrating proof of change of

⁴ E.g., a conviction for "negligent discharge" of pollutants under Clean Water Act section 309(c) may be a minor violation requiring minimal proof of change of corporate attitude, or it may be a significant violation reflecting knowing or deliberate conduct, requiring more substantial proof of such change. The determination will be made on the facts of each case. Criminal defendants and prosecutors frequently agree to enter a plea to a misdemeanor, rather than go to trial on more serious felony charges which may be supported by the facts.

⁵ Cases involving convictions for criminal negligence may include a wide range of conduct, from relatively minor, e.g., accidental spillage of a can of paint, up to potentially disastrous, e.g., failure to train employees properly and to respond to oil leak detection systems, which results in a massive oil spill. The label of "negligence" alone does not necessarily describe the nature and severity of the criminal conduct in a given case.

⁶ E.g., accidental spillage of paint into a storm sewer.

corporate attitude, policies, practices, and procedures.

In addition, a case may arise in which the violations which gave rise to listing occurred considerably before the request for removal. Nevertheless, as set forth at section IV, *infra*, to warrant removal, proof of change of corporate attitude for an appropriate continuing period of time, until the removal request is granted, is required if the crime involved fraud or deliberate falsification or concealment, knowing misconduct (unless minor), or serious negligent violations.

If a listed facility is sold (after the conduct which gave rise to the conviction or listing), the new owner of that facility is obligated to demonstrate that appropriate and effective corporate policies, practices, and procedures are in place, in accordance with the criteria and factors outlined in this guidance, before the facility will be removed from the List.

IV. Criteria for Demonstrating Proof of Change in Corporate Attitude

In cases where proof of change of corporate attitude is relevant to determining whether the condition giving rise to a criminal conviction has been corrected, factors to which EPA will look include, but are not limited to, the following:⁷

A. Whether the owner, operator, or supervisor of the [listed facility] has put in place an effective program to prevent and detect environmental problems and violations of the law. An "effective program to prevent and detect environmental problems and violations of the law" means a program that has been reasonably designed, implemented, and enforced so that it will be effective in preventing and detecting environmental problems or violations, and criminal conduct.

The hallmark of an effective program is that the organization exercises due diligence in seeking to prevent and detect environmental problems or violations, or criminal conduct. Due diligence requires, at a minimum, that the organization has taken at least the following types of steps to assure compliance with environmental requirements.

1. The organization must have written policies defining the standards and procedures to be followed by its agents or employees.⁸

⁷ These criteria are adapted from the proposed U.S. sentencing guidelines for organizational defendants.

⁸ Although specifics will be determined on a case-by-case basis, with reference to the conduct underlying the violation, examples include, but are

2. The organization must have specific high-level persons, not reporting to production managers, who have authority to ensure compliance with those standards and procedures.

3. The organization must have effectively communicated its standards and procedures to agents and employees, e.g., by requiring participation in training programs and by the dissemination of publications.

4. The organization must establish or have established an effective program for enforcing its standards, e.g., monitoring and auditing system designed to prevent or detect noncompliance; and a well-publicized system, under which agents and employees are encouraged to report, without fear of retaliation, evidence of environmental problems or violations, or criminal conduct within the organization.

5. The standards referred to in paragraph 1, above, must have been consistently enforced through appropriate disciplinary mechanisms.

6. After an offense or a violation has been detected, the organization must immediately take appropriate steps to correct the condition giving rise to the listing (even prior to the conviction or listing). The organization must also take all reasonable steps to prevent further similar offenses or violations, including notifying appropriate authorities of such offenses or violations, making any necessary modifications to the organization's program to prevent and detect environmental problems or violations of law, and discipline of individuals responsible for the offense or violation. This may include conducting an independent environmental audit to ensure that there are no other environmental problems or violations at the facility.

B. The precise actions necessary for an effective program to prevent and detect environmental problems or violations of law will depend upon a number of factors. Among the relevant factors are:

1. Size of organization: The requisite degree of formality of a program to prevent and detect violations of law or environmental problems will vary with the size of the organization; the larger the organization, the more formal the program should typically be.

2. Likelihood that certain offenses may occur because of the nature of its business: If, because of the nature of an organization's business, there is a

not limited to, training on company rules, EPA requirements, ethical standards and considerations, and standards of criminal liability.

substantial risk that certain types of offenses or violations may occur. management must have taken steps to prevent and detect those types of offenses or violations. For example, if an organization handles toxic substances it must have established standards and procedures designed to ensure that those substances are handled properly at all times.

3. Prior history of the organization An organization's prior may indicate types of offenses or violations that it should have taken actions to prevent. Recurrence of misconduct similar to that which an organization has previously committed casts doubt on whether it took all reasonable steps to prevent such misconduct.

An organization's failure to incorporate and follow applicable industry practice or the standards called for by applicable government regulation weighs againsts a finding of an effective program to prevent and detect violations of law or environmental problems.

C. EPA will also consider additional voluntary environmental cleanup, or pollution prevention or reduction measures performed, above and beyond those required by environmental statutes or regulations, and voluntary compliance with pending environmental requirements significantly before such compliance is actually required.

In cases where probation is imposed by the sentencing court, the term of probation will be presumed to be an appropriate period of time for demonstrating a change of corporate attitude, policies, practices, and procedures.² This presumption may be rebutted by either the owner, operator, or supervisor of the listed facility, or by the government; upon a showing that the probation terms is not an appropriate time in which to demonstrate such change. If probation is not imposed in the criminal case, the AA shall determine, after a request for removal from the list is filed, what is an appropriate period of time in which to demonstrate that the condition leading to conviction has been corrected. This determination shall be based upon the facts of each case.

The time required to demonstrate a change of corporate attitude, policies, practices, and procedures shall be presumed to be an appropriate period, as determined by the AA, commensurate with (a) the nature,

² The presumption is derived from the determination, which will already have been made by the sentencing court, that the convicted person's criminal conduct qualified as part of supervision.

extent, and severity of the violations (including the length of time during which the violations occurred), and (b) the complexity extent of remedial action necessary to ensure that appropriate policies, practices, and procedures (including, but not limit to, any necessary employee education or training programs), have been completed. At a minimum, the period of time shall be sufficient to demonstrate successful performance, Consistent with those policies, practices, and procedures, including consideration of steps which were taken prior to conviction or listing.

The policies and procedures set out in this document are intended for the guidance of government personnel and to inform the public. They are not intended, and cannot be relied upon, to create any rights, substantive or procedural, enforceable by any party in litigation with the United States.

Dated: November 13, 1991.

Scott C. Fultoc,
Acting Assistant Administrator for
Enforcement.

[FRL Doc. 91-28608 Filed 12-13-91; 8:45 am]
[RELEASER CODE 2000-00-00]

[FRL-4040-8]

Public Water Supply Supervision Program Revision for the State of Florida

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given that the State of Florida is revising its approved State Public Water Supply Supervision Primary Program. Florida has adopted drinking water regulations for treatment of volatile organic chemicals and issuance of public notification. EPA has determined that these sets of State program revisions are no less stringent than the corresponding federal regulations. Therefore, EPA has tentatively decided to approve these State program revisions.

All interested parties may request a public hearing. A request for a public hearing must be submitted by January 13, 1992 to the Regional Administrator at the address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by January 13, 1992, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this

determination shall become final and effective on January 19, 1992.

Any request for a public hearing shall include the following. (1) The name.

Drinking Water Section, Florida
Department of Environmental

Wayne Aronson, EPA, Region IV :
Drinking Water Section at the ultimate
address given above (telephone (404)

[RELEASER CODE 2000-00-00]
[FRL Doc. 91-28788 Filed 12-13-91; 8:45 am]
[RELEASER CODE 2000-00-00]

[RELEASER CODE 2000-00-00]
[FRL-4040-8]

Public Water Supply Supervision Program Revision for the State of Kentucky

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given that the State of Kentucky is revising its approved State Public Water Supply Supervision Primary Program. Kentucky has adopted drinking water regulations for treatment of volatile organic chemicals and issuance of public notification. EPA has determined that these sets of State program revisions are no less stringent than the corresponding federal regulations. Therefore, EPA has

SECTION IV

DEVELOPING AND IMPLEMENTING AN AUDIT PROGRAM

KEYS TO AN EFFECTIVE AUDIT PROGRAM

1. EXPLICIT TOP MANAGEMENT SUPPORT FOR ENVIRONMENTAL AUDITS AND A COMMITMENT TO FOLLOW UP AUDIT RESULTS

Also requires effective translation through middle management levels

2. AUDIT FUNCTION INDEPENDENT OF AUDITED ACTIVITIES

Ensures objectivity and freedom of inquiry

3. ADEQUATE STAFFING AND TRAINING

Getting the right people for the job

4. CLEAR OBJECTIVES AND RESOURCES

5. AN ORGANIZED PROCESS FOR INFORMATION COLLECTION AND ANALYSIS

6. MECHANISM FOR COMMUNICATING FINDINGS, CORRECTIVE ACTION AND IMPLEMENTATION SCHEDULES

7. QA REVIEW PROCESS

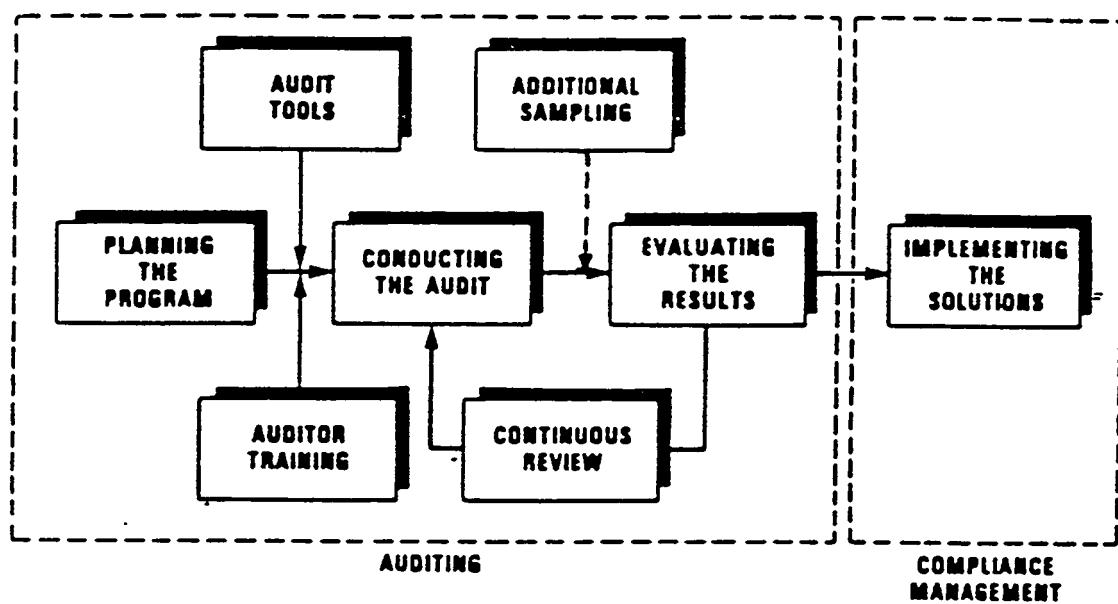
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2. AUDIT FUNCTION INDEPENDENT OF AUDITED ACTIVITES
3. ADEQUATE STAFFING AND TRAINING

4. CLEAR OBJECTIVES, SCOPE AND RESOURCES
5. AN ORGANIZED PROCESS FOR INFORMATION COLLECTION AND ANALYSIS
6. MECHANISM FOR COMMUNICATING FINDINGS, CORRECTIVE ACTION AND IMPLEMENTATION SCHEDULES
7. QA REVIEW PROCESS

ENVIRONMENTAL AUDITS

EXHIBIT IV-1

ELEMENTS OF AN AUDIT PROGRAM



Lawrence B. Cahill, Editor

with

Raymond W. Kane

Contributing Authors

Leonard J. Fleckenstein

Courtney M. Price

Mark M. Morrel

ENVIRONMENTAL AUDIT ACTION PLAN

1. ENVIRONMENTAL AUDIT REPORT

-- ELEMENTS

-- FORMAT

CONTENT

LEGAL REVIEW

-- DISTRIBUTION

AUDIT ACTION PLAN

DEFINE AND QUANTIFY THE DEFICIENCIES

IDENTIFY POTENTIAL REMEDIES

IDENTIFY SPECIFIC TASKS

APPOINT RESPONSIBLE PERSONS

ESTABLISH COMPLIANCE SCHEDULES AND BUDGET

ESTABLISH A TRACKING SYSTEM

PROVIDE FOR HIGH LEVEL REVIEW

DOCUMENT YOUR SUCCESSES

IV. DEVELOPING AND IMPLEMENTING AN AUDIT PROGRAM

HOW TO PREPARE FOR AND CONDUCT AN AUDIT

Andrea B. Wenderoth

L Environmental Audit Phases

1. Pre-audit activities
2. On-site activities
3. Post-audit activities

IL Pre-Audit Activities

1. Define scope and purpose of audit
 - A Many reasons for conducting an audit.
 - B Determining scope and purpose of the audit will assist in focusing audit preparation needs.
2. Review relevant regulations
3. If conducting interviews with yard personnel schedule interview in advance.

III. On-site Activities

1. Review relevant records and documentation
 - A Useful in determining requirements and compliance with such requirements.
 - B Examples of documentation to review include permits, logs, testing/sampling records.
2. Conducting interviews
 - A Conduct interviews in the interviewee's work space.
 - B Be sensitive to interviewee's nervousness or. defensiveness.
 - C Ask open-ended, rather than "yes" and "no" questions.

3. *Physical Inspection of Facilities*

- A *On-site physical inspections vary depending on audit objectives, scope, and size of facility.*
- B. *Individual checklists identify areas to inspect.*
- C. *Inspections should be timed to verify compliance. Eg., observation of emissions opacity should not be done during start-up or maintenance.*

IV. *Post-Audit Activities*

- A *Prior to leaving the facility, review informally the audit findings before anything is written in a report.*
 - 1. *Provides an opportunity to identify and remedy inconsistencies.*
- B. *If activities are uncovered that represent an imminent health or safety hazard identify concerns to yard management rather than waiting until the report is written.*

SECTION V

DOJ/EPA POLICY ON AUDITS AND ENFORCEMENT

MANAGING AUDIT INFORMATION

Robin A Fastenau
Collier Shannon & Scott

Information developed by an audit can expose a firm and its officers to civil and criminal liability and is potentially subject to pretrial discovery by an adversary party during litigation. The fear that the information will be disclosed is perhaps the greatest deterrent to wider corporate implementation of environmental auditing. However, under certain circumstances, the information obtained during an audit can be maintained confidentially and protected from disclosure.

I. Perceived Deterrents to Auditing

A Disclosure of audit information benefits a number of agencies and third-parties to the detriment of the auditing facility.

government regulators to determine compliance or to set future permitting limits

government attorneys investigating or prosecuting administrative civil or criminal cases

companies that are in competition with your company

companies seeking to acquire your company

private plaintiffs filing lawsuits for personal injury, and property or environmental damages caused by company products or operations

citizen-suit plaintiffs which seek to enforce compliance with agency rules, when an agency has failed to act

B. Auditing may also create additional corporate disclosure requirements.

environmental reporting regulations

- SEC filings regarding disclosure of substantial changes in projected costs of environmental compliance and liability

stockholders who may sue for damages if inadequate disclosure of corporate environmental liabilities.

II. Methods for Protection Audit Information

There are potentially three privileges which companies can invoke in order to limit disclosure of information obtained during an audit:

- attorney-client privilege
- work product doctrine
- . self-evaluative privilege

A Attorney-Client Privilege

The attorney-client privilege guarantees the confidentiality of a client's communication to his attorney so the attorney may render competent legal advice.

Leading case: Upjohn v. US, 449 U.S. 383(1981). The court declined to adopt a broad rule or series of rules to govern all conceivable future questions and left the issue of attorney-client privilege to be decided in the future on a case-by-case basis. The specific facts of the upjohn case are instructive as to how a court should interpret the privilege. Prior to Upjohn two distinct rules existed:

- a) Control Group Test - communications with an attorney made by individuals who were part of the "control group" were covered by the privilege. Whether a person was within the "control group" involved consideration of the individual's authority to control a decision and the individual's relative authority to prescribe or dictate corporate action based on the attorney's advice. This test usually only applied to senior company employees.
- b) Subject Matter Test - employees communication to counsel was privileged if it was
 - i) at a supervisor's direction
 - ii) for the purpose of getting legal advice;
 - iii) related to subject matter in line with the scope of the employee's duty and
 - iv) not disseminated beyond those persons who need to know its content.

The Upjohn court used a mix of these tests in holding that information contained in questionnaires to investigate "questionable payments" by employees in foreign countries was subject to the attorney-client privilege.

B. Work Product Doctrine

Work product doctrine extends beyond communications between attorneys and clients to information or materials prepared in anticipation of litigation. Such information is protected because of the inherent unfairness in allowing your opposition to discover your attorney's thoughts, opinions, plans and evaluations of the client's case.

Leading case Hickman v. Taylor, 329 U.S. 495 (1947). The rationale creating the work product doctrine was stated as follows:

- i) factual information such as witnesses' statements obtained by an attorney are not protected by the attorney-client privilege
- ii) although there is a broad policy against disclosure of information in a lawyer's files this policy does not make those files absolutely immune from discovery
- iii) the work product doctrine does not create an absolute privilege if the party seeking disclosure can demonstrate that production of the information is essential to preparation of one's case and it cannot be obtained elsewhere then some of the information may be disclosed; and
- iv) if information may be obtained elsewhere, the attorney's work product is not discoverable.

The rule articulated in the Hickman case has been essentially codified in Rule 26(b)(3) Fed. R. Civ. P.

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of

the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

In interpreting this Rule the following points must be remembered:

1. The phrase "in anticipation of litigation" puts a limitation on the when the work was produced.
2. Only documents and things are subject to the work product doctrine, the underlying facts are not protected.
3. Materials prepared by or on behalf of an attorney are protected so that materials prepared by consultants are protected.
4. The privilege can be waived by disclosure to third persons so that it is important to maintain the confidential nature of the information

C. Self-Evaluation Privilege

An evolving privilege exists to protect the public interest in confidentiality and to promote candid communication. This privilege has only been adopted in three circumstances to date: hospital committee information internal disciplinary investigations and equal employment opportunity compliance cases. It is specifically aimed at encouraging regulated entities to evaluate their compliance with regulatory requirements and correct problems internally, without fear of retaliation. This is a good argument to make in the context of environmental audits, but such a policy has not been adopted.

Self-auditing is a valuable tool for companies to evaluate their environmental compliance status, financial commitments necessary to insure future compliance and potential liabilities associated with environmental statutes. However, such information can also be used against companies by environmental regulators and by private parties in litigation. Accordingly, where it is appropriate companies should adopt the following procedures:

- 1 Audit program should be coordinated by a company's legal counsel.
- 1 Requests for information from employees should clearly state that such infomtion is required by counsel to render legal advice on environmental compliance or potential liabilities arising horn corporate activities.
- Because information necessary to develop an audit program is generally known only to middle- or lower-level employees, the audit program should contain a statement to that effect.
- 1 A company's audit policy should contain a statement of the purpose of the audit, its intended confidentiality and procedures to include counsel in necessary audit phases.
- Personnel on the audit team and employees interviewed during the audit should be instructed that the information discussed is confidential
- Paper work related to the audit should be stamped "confidential".



U.S. Department of Justice

Environment and Natural Resources Division

Office of the Assistant Attorney General

Washington, D.C. 20530

Barry M. Hartman

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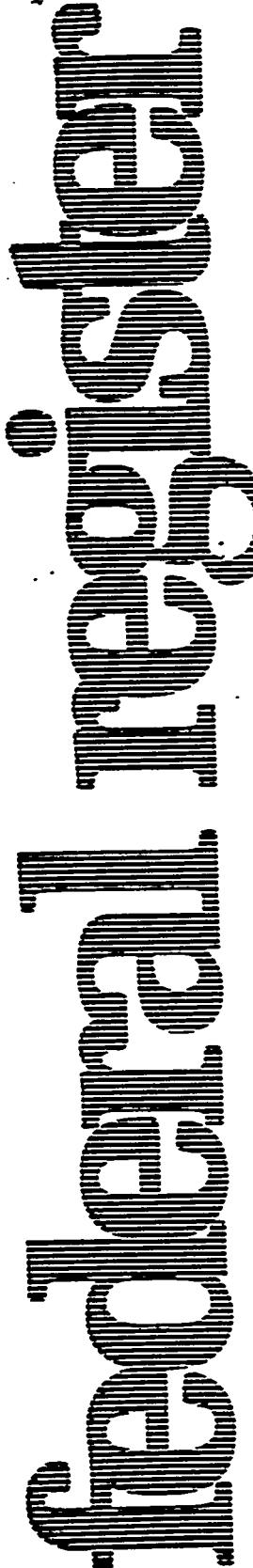
Barry M. Hartman is Acting Assistant Attorney General for the United States Department of Justice, Environment and Natural Resources Division. Directing a staff of over 300 attorneys, he is responsible for the representation of the United States in litigation across the spectrum of environmental law, from hazardous waste and air pollution to clean water and wetlands, coastal zone protection, biotechnology, pesticides, and resource management on federal lands and the outer continental shelf. He is responsible for reviewing and approving all civil and criminal prosecutions under the major environmental protection laws.

From 1979 until 1984, Mr. Hartman was associated with the Washington law firm of Smith, Heenan and Althen, where he practiced in the areas of labor, safety and health, and environmental law. He subsequently accepted an appointment by Pennsylvania Governor Dick Thornburgh as Chief Counsel to the Pennsylvania Department of Labor and Industry and also served as Executive Deputy General Counsel to the Governor. He returned to Washington in February 1989 on the personal staff of Attorney General Thornburgh, and was Deputy Assistant Attorney General in the Environment Division from September 1989 until being named Acting Assistant Attorney General.

Mr. Hartman is an honors graduate of the University of Pennsylvania and received his law degree from the George Washington University National Law Center.

Yell

Wednesday
July 9, 1986



Part IV

**Environmental
Protection Agency**

**Environmental Auditing Policy Statement;
Notice**

**ENVIRONMENTAL PROTECTION
AGENCY**
OPPE-FRL-3046-6

Environmental Auditing Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards. EPA first published this policy as interim guidance on November 8, 1985 (50 FR 46504). Based on comments received regarding the interim guidance, the Agency is issuing today's final policy statement with only minor changes.

This final policy statement specifically

- Encourages regulated entities to develop, implement and upgrade environmental auditing programs;
- Discusses when the Agency may or may not request audit reports;
- Explains how EPA's inspection and enforcement activities may respond to regulated entities' efforts to assure compliance through auditing;
- Endorses environmental auditing at federal facilities;
- Encourages state and local environmental auditing initiatives and
- Outlines elements of effective audit programs.

Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its accelerated use by regulated entities to help meet the goals of federal, state and local environmental requirements. However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements.

States are encouraged to adopt these or similar and equally effective policies in order to advance the use of environmental auditing on a consistent, nationwide basis.

DATES: This final policy statement is effective July 9, 1986.

FOR FURTHER INFORMATION CONTACT:
Leonard Fleckenstein, Office of Policy, Planning and Evaluation, (202) 382-2728;

or

Cheryl Wasserman, Office of Enforcement and Compliance Monitoring (202) 382-7550.

SUPPLEMENTARY INFORMATION

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble

On November 8, 1985 EPA published an Environmental Auditing Policy Statement, effective as interim guidance, and solicited written comments until January 7, 1988.

Thirteen commenters submitted written comments. Eight were from private industry. Two commenters represented industry trade associations. One federal agency, one consulting firm and one law firm also submitted comments.

Twelve commenters addressed EPA requests for audit reports. Three comments per subject were received regarding inspections, enforcement response and elements of effective environmental auditing. One commenter addressed audit provisions as remedies in enforcement actions, one addressed environmental auditing at federal facilities, and one addressed the relationship of the policy statement to state or local regulatory agencies. Comments generally supported both the concept of a policy statement and the interim guidance, but raised specific concerns with respect to particular language and policy issues in sections of the guidance.

General Comments

Three commenters found the interim guidance to be constructive, balanced and effective at encouraging more and better environmental auditing.

Another commenter, while considering the policy on the whole to be constructive, felt that new and identifiable auditing "incentives" should be offered by EPA. Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives-based" environmental auditing program with EPA. Moreover, general premises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the "incentives" most frequently mentioned in this context—are fraught with legal and policy obstacles.

Several commenters expressed concern that states or localities might

use the interim guidance to require auditing. The Agency disagrees that the policy statement opens the way for states and localities to require auditing. No EPA policy can grant states or localities any more (or less) authority than they already possess. EPA believes that the interim guidance effectively encourages voluntary auditing. In fact, Section II.B. of the policy states: "because audit quality depends to a large degree on genuine management commitment to the program and its objectives, auditing should remain a voluntary program."

Another commenter suggested that EPA should not expect an audit to identify all potential problem areas or conclude that a problem identified in an audit reflects normal operations and procedures. EPA agrees that an audit report should clearly reflect these realities and should be written to point out the audit's limitations. However, since EPA will not routinely request audit reports, the Agency does not believe these concerns raise issues which need to be addressed in the policy statement.

A second concern expressed by the same commenter was that EPA should acknowledge that environmental audits are only part of a successful environmental management program and thus should not be expected to cover every environmental issue or solve all problems. EPA agrees and accordingly has amended the statement of purpose which appears at the end of this preamble.

Yet another commenter thought EPA should focus on environmental performance results (compliance or non-compliance), not on the processes or vehicles used to achieve those results. In general, EPA agrees with this statement and will continue to focus on environmental results. However, EPA also believes that such results can be improved through Agency efforts to identify and encourage effective environmental management practices, and will continue to encourage such practices in non-regulatory ways.

A final general comment recommended that EPA should sponsor seminars for small businesses on how to start auditing programs. EPA agrees that such seminars would be useful. However, since audit seminars already are available from several private sector organizations, EPA does not believe it should intervene in that market, with the possible exception of seminars for government agencies, especially federal agencies for which EPA has a broad mandate under Executive Order 12088 to

provide technical assistance for environmental compliance.

Requests for Reports

EPA received 12 comments regarding Agency requests for environmental audit reports, far more than on any other topic in the policy statement. One commenter felt that EPA struck an appropriate balance between respecting the need for self-evaluation with some measure of privacy, and allowing the Agency enough flexibility of inquiry to accomplish future statutory missions. However, most commenters expressed concern that the interim guidance did not go far enough to assuage corporate fears that EPA will use audit reports for environmental compliance "witch hunts." Several commenters suggested additional specific assurances regarding the circumstances under which EPA will request such reports.

One commenter recommended that EPA request audit reports only "when the Agency can show the information it needs to perform its statutory mission cannot be obtained from the monitoring, compliance or other data that is otherwise reportable and/or accessible to EPA, or where the Government deems an audit report material to a criminal investigation." EPA accepts this recommendation in part. The Agency believes it would not be in the best interest of human health and the environment to commit to making a "showing" of a compelling information need before ever requesting an audit report. While EPA may normally be willing to do so, the Agency—not rule out in advance all circumstances in which such a showing may not be possible. However, it would be helpful to further clarify that a request for an audit report or a portion of a report normally will be made when needed information is not available by alternative means. Therefore, EPA has revised Section III.A., paragraph two and added the phrase: "and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise Available to the Agency."

Another commenter suggested that (except in the case of criminal investigations) EPA should limit requests for a audit documents to specific questions. By including the phrase "or relevant portions of a report" in Section III.A., EPA meant to emphasize it would not request an entire audit document when only a relevant portion would suffice. Likewise EPA fully intends not to request even a portion of a report if needed information or data can be otherwise obtained. To further clarify this point EPA has added the phrase:

"most likely focused on particular information needs rather than the entire report," to the second sentence of paragraph two. Section III.A. Incorporating the two comments above, the first two sentences in paragraph two of final Section III.A. now read "EPA" authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission or the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Other commenters recommended that EPA not request audit reports under any circumstances, that requests be "restricted to only those legally required," that requests be limited to criminal investigations, or that requests be made only when EPA has reason to believe "that the audit programs or reports are being used to conceal evidence of environmental non-compliance or otherwise being used in bad faith." EPA appreciates concerns underlying all of these comments and has considered each carefully. However, the Agency believes that these recommendations do not strike the appropriate balance between retaining the flexibility to accomplish EPAs statutory missions in future, unforeseen circumstances, and acknowledging regulated entities' need to self-evaluate environmental performance with some measure of privacy. Indeed, based on prime informal comments, the small number of formal comments received, and the even smaller number of adverse comments, EPA believes the final policy statement should remain largely unchanged from the interim version.

Elements of Effective Environmental Auditing

Three commenters expressed concerns regarding the seven general elements EPA outlined in the Appendix to the interim guidance.

One commenter noted that were EPA to further expand or more fully detail such elements, programs not specifically fulfilling each element would then be judged inadequate. EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another, but which may still result in effective auditing programs.

Accordingly, EPA does not plan to expand or more fully detail these auditing elements.

Another commenter asserted that states and localities should be cautioned not to consider EPA's auditing elements as mandatory steps. The Agency is fully aware of this concern and in the interim guidance noted its strong opinion that

"regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs." While EPA cannot require state or local regulators to adopt this or similar policies, the Agency does strongly encourage them to do so, both in the interim and final policies.

A final commenter thought the Appendix too specifically prescribed what should and what should not be included in an auditing program. Other commenters, on the other hand, viewed the elements described as very general in nature. EPA agrees with these other commenters. The elements are in no way binding. Moreover, EPA believes that most mature, effective environmental auditing programs do incorporate each of these general elements in some form, and considers them useful yardsticks for those considering adopting or upgrading audit programs. For these reasons EPA has not revised the Appendix in today's final policy statement.

Other Comments

Other significant comments address EPA inspection priorities for, and enforcement responses to, organizations with environmental auditing programs.

One commenter, stressing that audit programs are internal management tools, took exception to the phrase into second paragraph of section 111.B.1. of the interim guidance which states that environmental audits can 'complement regulatory oversight. By using the word 'complement' in this context, EPA does not intend to imply that audit reports must be obtained by the Agency in order to supplement regulatory inspections. 'Complement' is used in a broad sense of being in addition to inspections and providing something (i.e. self-assessment) which otherwise would be lacking. To clarify this point EPA has added the phrase "by providing self-assessment to assure compliance" after "environmental audits may complement inspections" in this paragraph.

The same commenter also expresses concern that, as EPA sets inspection priorities, a company having an audit program could appear to be a 'poor performer' due to complete and accurate reporting when measured against a

company which reports something less than required by law. EPA agrees that it is important to communicate this fact to Agency and state personnel, and will do so. However, the Agency does not believe a change in the policy statement is necessary.

A further comment suggested EPA should commit to take auditing programs into account when assessing all enforcement actions. However, in order to maintain enforcement flexibility under varied circumstances, the Agency cannot premise reduced enforcement responses to violations at all audited facilities when other factors may be overriding. Therefore the policy statement continues to state that EPA may exercise its discretion to consider auditing programs as evidence of honest and genuine efforts to assure compliance, which would then be taken into account in fashioning enforcement responses to violations.

A final commenter suggested the phrase "expeditiously correct environmental problems" not be used in the enforcement context since it implied EPA would use an entity's record of correcting nonregulated matters when evaluating regulatory violations. EPA did not intend for such an inference to be made. EPA intended the term "environmental problems" to refer to the underlying circumstances which eventually lead up to the violations. To clarify this point, EPA is revising the first two sentences of the paragraph to which this comment refers by changing "environmental problems" to "violations and underlying environmental problems" in the first sentence and to "underlying environmental problems" in the second sentence.

In a separate development EPA is preparing an update of its January 1984 Federal Facilities Compliance Strategy, which is referenced in section III, C. of the auditing policy. The Strategy should be completed and available on request from EPA's Office of Federal Activities later this year.

EPA thanks all commenters for responding to the November 8, 1985 publication. Today's notice is being issued to inform regulated entities and the public of EPA's final policy toward environmental auditing. This policy was developed to help (a) encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management and (b) guide internal EPA actions directly related to 10 regulated entities' environmental auditing programs.

EPA will evaluate implementation of this final policy to ensure it meets the above goals and continues to encourage

better environmental management, while strengthening the Agency's own efforts to monitor and enforce compliance with environmental requirements.

11. Genard EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirement; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices..

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans for wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.

Regulated entities¹ include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local, as well as special purpose organizations such as regional sewage commissions.

¹ See, e.g., "Current Practices in Environmental Auditing," EPA Report No. EPA-230-09-006, February 1984; "ANNOTATED Bibliography on Environmental Auditing," Fifth Edition, September 1985, both available from Regulatory Reform Staff, PM-223, EPA 401 M Street SW, Washington, DC 20460.

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility management attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally have greater resources to devote to an internal audit team while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to assure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental

performance of the facility lies with top management which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements as noted below). Because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Report

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will not routinely request environmental audit reports.

EPA's authority to request an audit report or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring reporting or other data otherwise available to the Agency. Examples would likely include situations where audits are conducted under consent decrees or other settlement agreements: a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list

² An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section 11A of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information stray be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA even if there is no explicit 'requirement' to generate that data. Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g. Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirement EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

EPA will not premise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies

³ See, for example, "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities," Environmental Law Institute report to EPA, final report, September 1985.

establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus, while EPA inspections of self-audited facilities will continue to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history maybe subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2 Audit Provisions as Remedies in Enforcement Actions

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future. Environmental auditing provisions are most likely to be proposed in settlement negotiations where:

1 A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system or

1 The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity.

⁴ EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

Through this consent decree approach and other means, EPA may consider how to encourage effective auditing by publicly owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy SPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing at Federal Facilities

SPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to SPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expeditiously develop schedules for remedial action.

To the extent feasible, EPA will provide technical assistance to help federal agencies design and initiate audit programs. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility environmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to environmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the SPA Federal Facilities Compliance Strategy (January 1984, update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office (and responsible state agencies, where appropriate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or

negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA Federal Facilities Compliance Strategy only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy.

1 Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.

1 Regulatory agencies cannot make premises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.

1 When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.

1 Regulatory agencies must continue to meet minimum program requirements

(e.g. minimum inspection requirements, etc.).

1 Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improve.

Dated: June 28, 1986.

Lee M. Thomas,
Administrator.

Appendix-Elements of Effective Environmental Auditing Programs

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (1983, Walter Willborn, American Society for Quality Control) and "Standards for the professional Practice of Internal Auditing" (1961, The Institute of Internal Auditors, Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. Explicit top management support for environmental auditing and commitment to follow-up audit findings. Management support may be demonstrated by a written policy articulating upper management support for the auditing program and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow up on audit findings to correct identified problems and prevent their recurrence.

II. An environmental auditing function independent of audited activities. The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. Adequate team staffing and auditor training. Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives. Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. Explicit audit program objectives, scope, resources and frequency. At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. A process which collects analyzes, interprets and documents information sufficient to achieve audit objectives. Information should be collected before and during an onsite visit regarding environmental compliance(1), environmental management effectiveness(2), and other matters (3) related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. Sufficient information is factual, adequate and convincing so that a prudent informed person would be likely to reach the same conclusions as the auditor.

b. Reliable information is the best attainable through use of appropriate audit techniques.

C. Relevant information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. Useful information helps the organization meet its goals.

The audit process should include a periodic review of reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.

Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identified problems.
Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits. Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

[2] A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include Resource Conservation and Recovery Act, federal Water pollution Control Act, clean AirAct, Hazardous Materials Transportation Act, Toxic Substances Control Act, Comprehensive Environmental Response, Compensation and Liability Act, Safe Drinking Water Act, Federal Insecticide, Fungicide and Rodenticide Act, Marine protection, Research and Sanctuaries Act, Uranium Mill Tailings Radiation Control Act.

In addition, state and local government are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building, fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

[2] An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices, regardless of whether they are part of the environmental system or the operation and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policy which: a. implement regulatory requirements b. provide management guidance for environmental hazards not specifically addressed in regulations:

2 Train and motivate facility personnel to work in an environment ally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy:

3. Communicate relevant environmental developments expeditiously to facility and other personnel:

4. Communicate effectively with government and the public regarding serious environmental incidents:

5. Require third parties working for, with or on behalf of the organization to follow its environmental procedures:

6. Make proficient personnel available at all times to carry out environmental (especially emergency) procedures;
7. Incorporate environmental protection into written operating procedural
8. Apply best management practices and operating procedures, including "good housekeeping" techniques;
9. Institute preventive and corrective maintenance systems to minimize actual and potential environmental harm;
10. Utilize best available process and control technologies;
11. Use most-effective sampling and monitoring techniques, test methods, recordkeeping systems or reporting protocols (beyond) minimum legal requirements
12. Evaluate causes behind any serious environmental incidents and establish procedures to avoid recurrence;
13. Exploit source reduction recycle and reuse potential wherever practical; and
14. Substitute materials or processes to allow use of the least-hazardous substances feasible.

(3) Auditors could also assess environmental risks and uncertainties.

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FACTORS IN DECISIONS ON CRIMINAL
PROSECUTIONS FOR ENVIRONMENTAL VIOLATIONS
IN THE CONTEXT OF SIGNIFICANT VOLUNTARY
COMPLIANCE OR DISCLOSURE EFFORTS BY THE VIOLATOR

I. Introduction

It is the policy of the Department of Justice to encourage self-auditing, self-policing and voluntary disclosure of environmental violations by the regulated community by indicating that these activities are viewed as mitigating factors in the Department's exercise of criminal environmental enforcement discretion. This document is intended to describe the factors that the Department of Justice considers in deciding whether to bring a criminal prosecution for a violation of an environmental statute, so that such prosecutions do not create a disincentive to or undermine the goal of encouraging critical self-auditing, self-policing, and voluntary disclosure. It is designed to give federal prosecutors direction concerning the exercise of, prosecutorial discretion in environmental criminal cases and to ensure that such discretion is exercised consistently nationwide. It is also intended to give the regulated community a sense of how the federal government exercises its criminal prosecutorial discretion with respect to such factors as the defendant's voluntary disclosure, of violations, cooperation with the

government in investigating the violations, use of environmental audits and other procedures to ensure compliance with all applicable environmental laws and regulations, and use of measures to remedy expeditiously and completely any violations and the harms caused thereby.

This guidance and the examples contained herein provide a framework for the determination of whether a particular case presents the type of circumstances in which lenience would be appropriate.

II. Factors to be Considered

Where the law and evidence would otherwise be sufficient for prosecution, the attorney for the Department should consider the factors contained herein, to the extent they are applicable, along with any other relevant factors, in determining whether and how to prosecute. It must be emphasized that these are examples of the types of factors which could be relevant. They do not constitute a definitive recipe or checklist of requirements. They merely illustrate some of the types of information which is relevant to our exercise of prosecutorial discretion.

It is unlikely that any one factor will be dispositive in any given case. All relevant factors are considered and given the weight deemed appropriate in the particular case. See Federal Principles of Prosecution (U.S. Dept. of Justice, 1980), Comment to Part A.2; Part B.3.

A. Voluntary Disclosure

The attorney for the Department should consider whether the person made a voluntary, timely and complete disclosure of the matter under investigation. Consideration should be given to whether the person came forward promptly after discovering-the noncompliance, and to the quantity and quality of information provided. Particular consideration should be given to whether the disclosure substantially aided the government's investigatory process, and whether it occurred before a law enforcement or regulatory authority (federal, state or local authority) had already obtained knowledge regarding noncompliance. A disclosure is not considered to be "voluntary" if that disclosure is already specifically required by law, regulation, or permit.

B. Cooperation

The attorney for the Department should consider the degree and timeliness of cooperation by the person. Full and prompt cooperation is essential, whether in the context of a voluntary disclosure or after the government has independently learned of a violation. Consideration should be given to the violator's

As used in this document, the terms "person" and "violator" are intended to refer to business and nonprofit entities as well as individuals.

For example, any person in charge of a vessel or of an on shore facility or an offshore facility is required to notify the appropriate agency of the United States Government of any discharge of oil or a hazardous substance into or upon inter alia the navigable waters of the United States. Section 311(b)(5) of the Clean Water Act, 33 U.S.C. 1321(b)(5), as amended by the Oil Pollution Act of 1990, Pub. L. 101-380, & 4301(a), 104 Stat. 485, 533 (1990).

willingness to make all relevant information (including the complete results of any internal or external investigation and the names of all potential witnesses) available to government investigators and prosecutors. Consideration should also be given to the extent and quality of the violator's assistance to the government's investigation.

C. Preventive Measures and Compliance Programs

The attorney for the Department should consider the existence and scope of any regularized, intensive, and comprehensive environmental compliance program: such a program may include an environmental compliance or management audit. Particular consideration should be given to whether the compliance or audit program includes sufficient measures to identify and prevent future noncompliance, and whether the program was adopted in good faith in a timely manner.

Compliance programs may vary but the following questions should be asked in evaluating any program: was there a strong institutional policy to comply with all environmental requirements? Had safeguards beyond those required by existing law been developed and implemented to prevent noncompliance from occurring? Were there regular procedures, including internal or external compliance and management audits, to evaluate, detect, prevent and remedy circumstances like those that led to the noncompliance? Were there procedures and safeguards to ensure the integrity of any audit conducted? Did the audit evaluate all sources of pollution (i.e., all media), including the possibility

of cross-media transfers of pollutants? Were the auditor's recommendations implemented in a timely fashion? Were adequate resources committed to the auditing program and to implementing its recommendations? Was environmental compliance a standard by which employee and corporate departmental performance was judged?

D. Additional Factors Which May Relevant

1. Pervasiveness of Noncompliance

Pervasive noncompliance may indicate systemic or repeated participation in or condonation of criminal behavior. It may also indicate the lack of a meaningful compliance program. In evaluating this factor, the attorney for the Department should consider, among other things, the number and level of employees participating in the unlawful activities and the obviousness, seriousness, duration, history, and frequency of noncompliance.

2. Internal Disciplinary Action

Effective internal disciplinary action is crucial to any compliance program. The attorney for the Department should consider whether there was an effective system of discipline for employees who violated company environmental compliance policies. Did the disciplinary system establish an awareness in other employees that unlawful conduct would not be condoned?

3. Subsequent Compliance Efforts

The attorney for the Department should consider the extent of any efforts to remedy any ongoing noncompliance. The promptness and completeness of any action taken to remove the source of the noncompliance and to lessen the environmental harm

resulting from the noncompliance should be considered.

Considerable weight should be given to prompt, good-faith efforts to reach environmental compliance agreements with federal or state authorities, or both. Full compliance with such agreements should be a factor in any decision whether to prosecute.

III. Application of These Factors to Hypothetical Examples

These examples are intended to assist federal prosecutors in their exercise of discretion in evaluating environmental cases. The situations facing prosecutors, of course, present a wide variety of fact patterns. Therefore, in a given case, some of the criteria may be satisfied while others may not. Moreover, satisfaction of various criteria may be a matter of degree. Consequently, the effect of a given mix of factors also is a matter of degree. In the ideal situation, if a company fully meets all of the criteria, the result may be a decision not to prosecute that company criminally. Even if satisfaction of the criteria is not complete, still the company may benefit in terms of degree of enforcement response by the government. The following hypothetical examples are intended to illustrate the operation of these guidelines.

Example 1:

This is the ideal case in terms of criteria satisfaction and consequent prosecution leniency.

While this policy applies to both individuals and organizational violators, these examples focus particularly upon situations involving organizations.

1. Company A regularly conducts a comprehensive audit of its compliance with environmental requirements.
2. The audit uncovers information about employees' disposing of hazardous wastes by dumping them in an unpermitted location.
3. An internal company investigation confirms the audit information. (Depending upon the nature of the audit, this follow-up investigation may be unnecessary.)
4. Prior to the violations the company had a sound compliance program, which included clear policies, employee training, and a hotline for suspected violations.
5. As soon as the company confirms the violations, it discloses all pertinent information to the appropriate government agency; it undertakes compliance planning with that agency; and it carries out satisfactory remediation measures.
6. The company also undertakes to correct any false information previously submitted to the government in relation to the violations.
7. Internally the company disciplines the employees actually involved in the violations, including any supervisor who was lax in preventing or detecting the activity. Also, the company reviews its compliance program to determine how the violations slipped by and corrects the weaknesses found by that review.

8. company discloses to the government the names of the employees actually responsible for the violations, and it cooperates with the government by providing documentation necessary to the investigation of those persons.

Under these circumstances Company A would stand a good chance of being favorably considered for prosecutorial leniency, to the extent of not being criminally prosecuted at all. The degree of any leniency, however, may turn upon other relevant factors not specifically dealt with in these guidelines.

Example 2:

At the opposite end of the scale is Company Z, which meets few of the criteria. The likelihood of prosecutorial leniency, therefore, is remote. Company Z's circumstances may include any of the following:

1. Because an employee has threatened to report a violation to federal authorities, the company is afraid that investigators may begin looking at it. An audit is undertaken, but it focuses only upon the particular violation, ignoring the possibility that the violation may be indicative of widespread activities in the organization.
2. After completing the audit, Company Z reports the violations discovered to the government.

For example, if the company had a long history of noncompliance, the compliance audit was done only under pressure from regulators, and a timely audit would have ended the violations much sooner, those circumstances would be considered.

3. The company had a compliance program, but it was effectively no more than a collection of paper. No effort is made to disseminate its content, impress upon employees its significance, train employees in its application, or oversee its implementation.

4. Even after "discovery" of the violation the company makes no effort to strengthen its compliance procedures.

5. The company makes no effort to come to terms with regulators regarding its violations. It resists any remedial work and refuses to pay any monetary sanctions.

6. Because of the non-compliance, information submitted to regulators over the years has been materially inaccurate, painting a substantially false picture of the company's true compliance situation. The company fails to take any steps to correct that inaccuracy.

7. The company does not cooperate with prosecutors in identifying those employees (including managers) who actually were involved in the violation, and it resists disclosure of any documents relating either to the violations or to the responsible employees.

In these circumstances leniency is unlikely. The only positive action is the so-called audit, but that was so narrowly focused as to be of questionable value, and it was undertaken only to head off a possible criminal investigation. Otherwise, the company demonstrated no good faith either in terms of

compliance efforts or in assisting the government in obtaining a full understanding of the violation and discovering its sources.

Nonetheless, these factors do not assure a criminal prosecution of Company Z. As with Company A, above, other circumstances may be present which affect the balance struck by prosecutors. For example, the effect of the violation (because of substance, duration, or amount) may be such that prosecutors would not consider it to be an appropriate criminal case. Administrative or civil proceedings may be considered a more appropriate response.

Other examples:

Between these extremes there is a range of possibilities. The presence, absence, or degree of any criterion may affect the prosecution's exercise of discretion. Below are some examples of such effects:

1. In a situation otherwise similar to that of Company A, above, Company B performs an audit that is very limited in scope and probably reflects no more than an effort to avoid prosecution. Despite that background, Company B is cooperative in terms of both bringing itself into compliance and providing information regarding the crime and its perpetrators. The result could be any of a number of outcomes, including prosecution of a lesser charge or ^a decision to prosecute the individuals rather than the company.

2. Again the situation is similar to Company As, but Company C refuses to reveal any information regarding the individual violators. The likelihood of the government's prosecuting the company are substantially increased.

3. In another situation similar to Company As, Company D chooses to "sit on" the audit and take corrective action without telling the government. The government learns of the situation months or years after the fact.

A complicating fact here is that environmental regulatory programs are self policing: they include a substantial number of reporting requirements. If reports which in fact presented false information are allowed to stand uncorrected, the reliability of this system is undermined. They also may lead to adverse and unfair impacts upon other members of the regulated community. For example, Company D failed to report discharges of X contaminant into a municipal sewer system, discharges that were terminated as a result of an audit. The sewer authority, though, knowing only that there have been excessive loadings of X, but not knowing that Company D was a source, tightens limitations upon all known sources of X. Thus, all of those sources incur additional treatment expenses, but Company D is unaffected. Had Company D revealed its audit results, the other companies would not have suffered unnecessary expenses.

In some situations, moreover, failure to report is a crime. see, e.g., 33 U.S.C. § 1321(b)(5) and 42 U.S.C. 5 9603(b). To illustrate the effect of this factor, consider Company E, which conducts a thorough audit and finds that hazardous wastes have been disposed of by dumping them on the ground. The company cleans up the area and tightens up its compliance program, but does not reveal the situation to regulators. Assuming that a reportable quantity of a hazardous substance was released, the company was under a legal obligation under 42 U.S.C. 5 9603(b) to report that release as soon as it had knowledge of it, thereby allowing regulators the opportunity to assure proper clean up. Company E's knowing failure to report the release upon learning of it is itself a felony.

In the cases of both Company D and Company E, consideration would be given by prosecutors for remedial efforts: hence prosecution of fewer or lesser charges might result. However, because Company D's silence adversely affected others who are entitled to fair regulatory treatment and because Company E deprived those legally responsible for evaluating cleanup needs of the ability to carry out their functions, the likelihood of their totally escaping criminal prosecution is significantly reduced.

4. Company F's situation is similar to that of Company B. However, with regard to the various violations shown by the audit, it concentrates upon correcting only the easier, less

expensive, less significant among them. **Its lackadaisical** approach to correction does not make it **a strong candidate** for leniency.

5. Company G is similar to Company D in that it performs an audit and finds violations, but does not bring them to the government's attention. Those violations do not involve failures to comply with reporting requirements. The company undertakes a program of gradually correcting its violations. When the government learns of the situation, Company G still has not remedied its most significant violations, but claims that it certainly planned to get to them. Company G could receive some consideration for its efforts, but its failure to disclose and the slowness of its remedial work probably mean that it cannot expect a substantial degree of leniency.

6. Comprehensive audits are considered positive efforts toward good faith compliance. However, such audits are not indispensable to enforcement leniency. Company H's situation is essentially identical to that of Company A, except for the fact that it does not undertake a comprehensive audit. It does not have a formal audit program, but, as a part of its efforts to ensure compliance, does realize that it is committing an environmental violation. It thereafter takes steps otherwise identical to those of Company A in terms of compliance efforts and cooperation. Company H is also a likely candidate for leniency, including possibly no criminal prosecution.

In sum, mitigating efforts made by the regulated community will be recognized and evaluated. The greater the showing of good faith, the more likely it will be met with leniency. Conversely, the less good faith shown, the less likely that prosecutorial discretion will tend toward leniency.

IV. Nature of this Guidance

This guidance explains the current general practice of the Department in making criminal prosecutive and other decisions after giving consideration to the criteria described above, as well as any other criteria that are relevant to the exercise of criminal prosecutorial discretion in a particular case. This discussion is an expression of, and in no way departs from, the long tradition of exercising prosecutorial discretion. The decision to prosecute "generally rests entirely in [the prosecutor's] discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). This discretion is especially firmly held by the criminal prosecutor. The criteria set forth above are intended only as internal guidance to Department of Justice attorneys. They are not intended to, do not, and may not be relied upon to create a right or benefit, substantive or procedural, enforceable

Although some statutes have occasionally been held to require civil enforcement actions, see e.g., Dunlop v. Bachowski, 421 U.S. 560 (1975), those are unusual cases, and the general rule is that both-civil-and criminal enforcement-is at the-enforcement agency's discretion where not prescribed by law. Heckler v. Chancey, 470 U.S. 821, 830-35 (1985); Cutler v. Hayes, 818 F.2d 879, 893 (D.C. Cir. 1987) (decisions not to enforce are not reviewable unless the statute provides an "inflexible mandate").

Newman v. United States, 382 F.2d 479, 480 (D.C. Cir. 1967).

at law by a party to litigation with the United States, nor do they in any way limit the lawful mitigative prerogatives, including civil enforcement actions, of the Department of Justice or the Environmental Protection Agency. They are provided to guide the effective use of limited enforcement resources, and do not derive from, find their basis in, nor constitute any legal requirement, whether constitutional, statutory, or otherwise, to forego or modify any enforcement action or the use of any evidentiary material. See Principles of Federal Prosecution (U.S. Dept. of Justice, 1980) p. 4; United States Attorneys' Manual (U.S. Dept. of Justice, 1986) 1-1.000.

SECTION VI

AUDITING SHIPYARDS -- THE NAVY EXPERIENCE

NAVAL SHIPYARD ENVIRONMENTAL PROTECTION PROGRAM

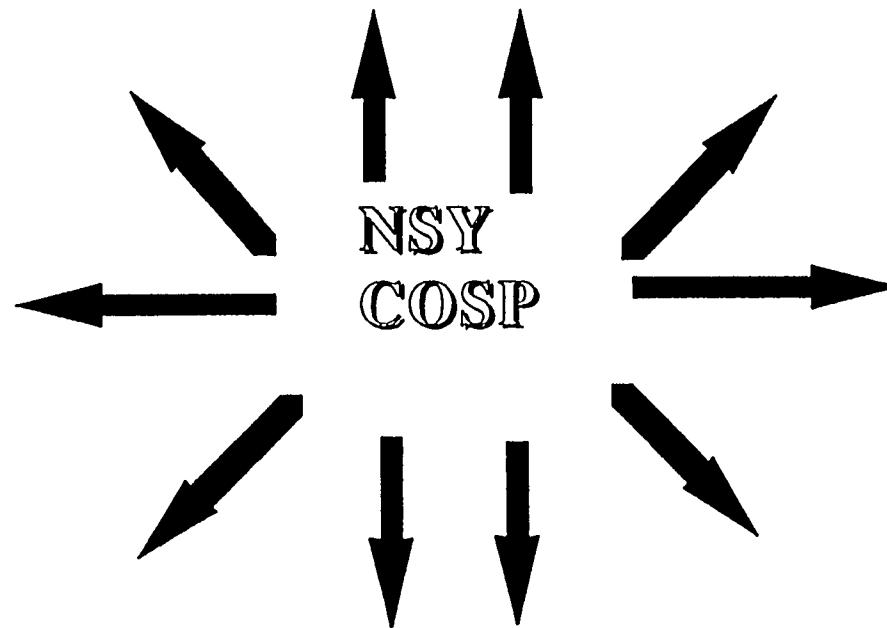
**Presented by CW03 M W Purvis
Environmental Compliance Specialist
Naval Sea Systems Command (NAVSEA 07I&E)
Installations and Environmental Office**

ENVIRONMENTAL COMPLIANCE EVALUATIONS

BUILDING BLOCKS OF SHIPYARD ENVIRONMENTAL PROTECTION PROGRAM

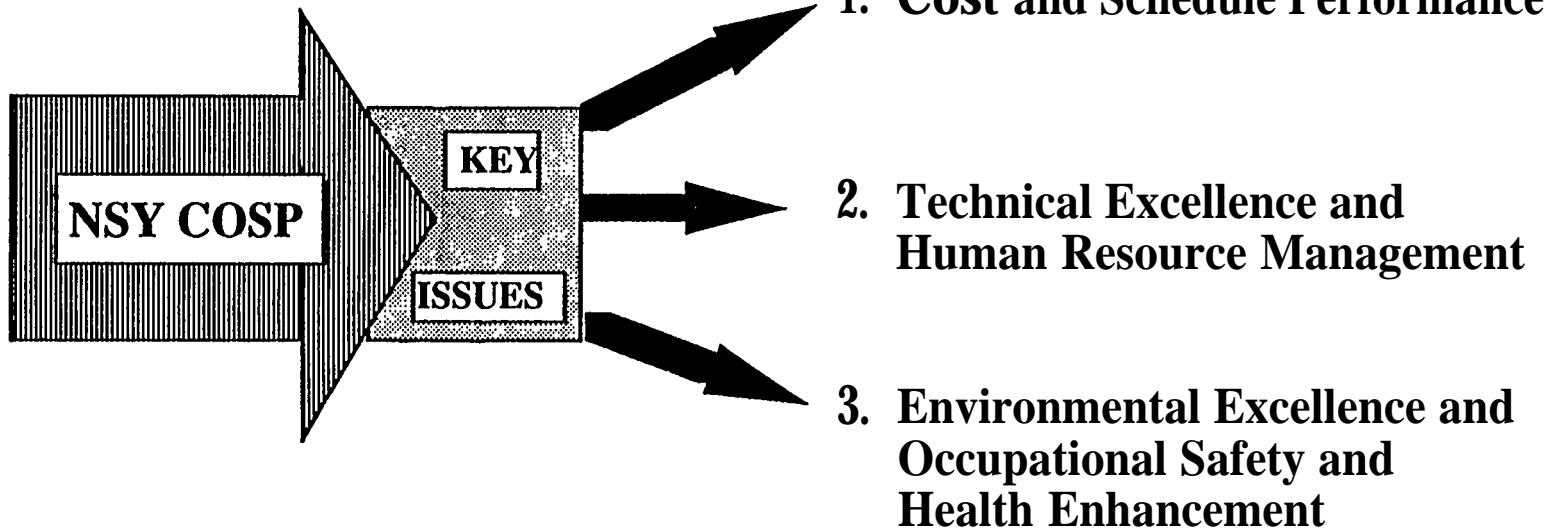
- NSY Corporate Operations Strategy and Plan
- Environmental Compliance Evaluations
- NSY Environmental Directors Executive Steering Group

CORPORATE OPERATIONS STRATEGY AND PLAN



ENVIRONMENTAL COMPLIANCE EVALUATIONS

NSY CORPORATE OPERATIONS STRATEGY AND PLAN



3A ENVIRONMENTAL EXCELLENCE

Action Plans:

3A.01 Develop Environmental Compliance Plans Incorporate DoD, Navy, Federal, State, and Local Requirements

3A.02 Develop Training Plans Incorporating Environmental Requirements

3A.03 Reduce Both the Number of Hazardous Waste Streams and the Volume of Hazardous Waste Generated and Disposed of in the Industrial Processes

3A.04 Identify the Cost of Compliance and Resources Including all Potential External Funding Sources Necessary to Achieve Compliance

NAVY ENVIRONMENTAL COMPLIANCE EVALUATION PROGRAM

OPNAVINST 5090.1A (Environmental and Natural
Resources Program Manual)

THREE TIERED STRUCTURE:

1. Activity Annual Self Audit
2. Triennial Major Claimant Evaluation
3. Periodic Navy Inspector General Inspection

BUILDING BLOCKS OF SHIPYARD ENVIRONMENTAL PROTECTION PROGRAM

Thorough and Comprehensive Evaluation

■ Biennial Vice Triennially

Additional Value Added:

- Evaluation by Peers (Personnel from other shipyards)
 - . On the Job Training Opportunity for Team Members
- Evoking Ownership By Team Members (Experiencing how another Shipyard Does It.)
- Building a Naval Shipyard Community

NSY ECE PROGRAMS

- Management
- PCBs
- Cultural, Historical & Archeological
- Self Evaluation Program
- Infectious Waste
- Asbestos
- Solid Waste
- SARA TITLE III
- NEPA
- Air Emissions
- Hazardous Waste Minimization
- Radon
- Pesticides
- Hazardous Material
- Waste Water
- Natural Resources
- Drinking Water
- Contingency Planning
- Installation Restoration
- Oil Pollution Prevention
- Laboratory
- Hazardous Waste Control
- Noise
- Underground Storage Tanks

TOOLS EMPLOYED IN THE NSY EPP

Quarterly Reports

NSY Environmental Directors Work Shops

Environmental Compliance Management Systems (ECMS)

Baseline Assessments

Annual Assessments

NSY Environmental Compliance Strategy

Environmental Compliance Manual (ECM)

Reorganization of NSY Structure; Senior Manager with

Direct Access to CO

Training Curriculum

Lead Yards

INACTIVE SHIP MAINTENANCE FACILITIES (NISMF) ECES

NISMFs belong to SEA 91

Four NISMFs: Pearl
Norfolk
Bremerton
Philadelphia

First Round Completed

Usually Conducted in Conjunction with NSY ECES

Conducted by SEA 071&E with SEA 91 Participation

BUILDING BLOCKS OF SHIPYARD ENVIRONMENTAL PROTECTION PROGRAM

15 Supervisor of Shipbuilding

Assistance from NAVSEA Naval Reserve Units

DEADLINE to Complete; Ott 93

SUPSHIPS Environmental Directors Steering
Group to be established

ENVIRONMENTAL COMPLIANCE EVALUATIONS

SECTION VII
CONDUCTING A SHIPYARD AUDIT

THIS SECTION PRINTED UNDER SEPARATE COVER

NSRP REPORT NO. 0345

TITLE ENVIRONMENTAL COMPLIANCE
 INSPECTION CHECKLIST FOR
 SHIPBUILDING FACILITIES

SECTION VIII
ENVIRONMENTAL BULLETIN BOARD

The NSRP Environmental Bulletin Board

User's Manual

Collier, Shannon and Scott

March, 1992

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THE NSRP ENVIRONMENTAL BULLETIN BOARD

The NSRP Environmental Bulletin Board is an electronic communications system designed and operated for the purpose of providing timely information on environmental issues affecting the shipbuilding and ship repair industry.

This manual is designed to answer questions which may arise before, during and after the use of the Bulletin Board. It will assist a caller in setting up his communications software before calling, provide explanations of the bulletin board menus during its use and describe how a user can view or print any files that have been received.

GENERAL

When working with a Bulletin Board Service ("BBS"), one is actually operating two computers at the same time: the "local" computer in your office, and the "remote". This is sometimes confusing because you, as the operator, will not see the operation of the remote system.

When using a BBS you, as the user will tell each computer separately what to do. You will instruct your local computer to initiate a call, and once the remote answers, you will tell it what you want to see. You will tell your computer ("local") where you want to send a file you want to receive ("download") and you will tell the other computer ("remote") which file you want to receive. These transfer methods are called protocols. As long as you the receiving and sending computer to use the same protocols you, as the user, do not need to understand how they work. Transmission errors are handled within the file transfer protocol.

The bulletin board is maintained by a System Operator ("SYSOP"). The NSRP Environmental Bulletin Board SYSOP is Rick Maas. He can be reached by phone at (202) 342-8570 during normal Collier, Shannon and Scott business hours. You can also reach him through the bulletin board while you are on-line (more on how to do this later). If you are having difficulty, page the SYSOP and he will assist you.

The bulletin board is setup with certain default limitations. Each caller is allowed 72 minutes per day of usage. The bulletin board has three incoming phone lines to insure that everyone will have access to the bulletin board every day.

Also it is important to note that the bulletin board will automatically log off a caller if it does not receive some keyboard activity for five minutes. If you are on the bulletin board and are interrupted by a phone CQ the remote computer will log you off after five minutes. This insures that a caller can not tie up the system inadvertently. If you are interrupted while on the system and return to your computer to find you are disconnected, it is probably because the bulletin board has logged you off. You will have to start the call over again.

COMMUNICATIONS

There are several different communication software programs available on the market. Any program that is IBM compatible will work on the NSRP Environmental Bulletin Board. Your steps to enter the Bulletin Board will vary depending upon which communication program you choose. You will need to know the baud rate for your modem. You will also need to know certain other information. The Bulletin Board answers the telephone at 300 baud, no (N) parity, eight (8) data bits (XMODEM), and one (1) stop bit. If you are using a faster modem (higher than 300 baud), don't worry. The system automatically recognizes the speed at which you are calling and will adjust to your speed. The system can go as fast as 9600 baud.

Two of the most popular communication software program in use today are Procomm or Procomm Plus and CrossTalk. Instructions for their use on the system follows. Commands that you type will be displayed in italics.

Procomm or Procomm Plus

- L Start Procomm by typing PROCOMM in the Procomm directory (probably C:\PRCM).
2. Display the Procomm dialing directory by typing ALT-D.
(NOTE Alt-F10 at any blank screen will display Procomm's help menu.)
3. Select "NSRP Environmental Bulletin Board" off the dialing directory (use the number of the selection listed to the left) or modify a directory entry to call the bulletin board at (202) 298-6399, your baud rate, no parity, 8 bits and 1 stop bit.
4. Procomm will automatically set your communications parameters to those selected and dial the bulletin board.

You should hear your modem dial and connect (dialing sounds, two tones . and static).

5. Once you have connected, the remote computer will prompt you for your First Name, Last Name and Password.

Once you have entered this information the remote computer will take you into the bulletin board.

DOWNLOADING

Once you are into the bulletin board (the "remote") and selected a file you want to have "downloaded" or sent to your computer (the "local"), you must tell both

computers what you are doing. You must tell the remote Which file(s) you want it to send and you must tell your computer where you want the incoming file to be received. The following instructions will explain that process:

1. Once in the Files Subsystem after you have determined which file(s) you want to receive, select "D" for Download.
2. The bulletin board will ask which file(s) you want to receive. Type inⁱ the name(s) of the files you want to receive. (CAUTION: You must type in the exact name of the file(s) you want to receive, both first name and last name.)
3. The bulletin board will prompt you for the communications protocol you want it to use to send the file you have selected. We suggest you use XMODEM (It is slower, but reliable).

You have now finished telling the "remote" computer what you want it to do. Before you can successfully download, you must tell- your computer to accept the download.

4. Using Procomm press "Page Down" to tell your computer to accept the download.
5. Procomm will display a list of communications protocols to use for the download. Select the same protocol you selected on the "remote" computer, "X" for XMODEM.
6. Procomm will ask you for the name of the incoming file. You can give it the same name that the file has on the bulletin board, or you can name it whatever you want. (If you choose to rename it be sure you remember the name so you can recall it after you have logged off.) You can also designate where you want the file to be received. You can receive it onto your hard drive (C:, probably) or onto a floppy drive (A, probably If you choose this option be sure you have a floppy disk in that drive).
7. Once you have given Procomm the name of the file and the drive where you want the file to be received and set the communications protocols, you must return to the "remote" computer by pressing "ENTER".
8. You can now begin the download process by pressing "ENTER".
9. The bulletin board will display the number of "blocks" the requested file contains, and will also display a running tabulation of the number of "blocks" sent. Once the download is complete the remote computer will display a message that either the download was successful or not. If successful, you can download another file, move to another subsystem or log off.

EXITING PROCOMM

Once you have logged off the bulletin board and are ready to read the files you have downloaded you must leave Procomm To do this type "Alt-X". This will return you to the C: prompt of your computer.

CROSSTALK

1. **Start Crosstalk by typing *XTALK* in the Crosstalk directory (probably c:\xTALK).**
2. Crosstalk will display numbers already entered at the bottom of the screen. Choose "NSRP Bulletin Board" (use the number designation just to the left of the selection) or enter the information for the bulletin board by selecting "NEWUSER. The information needed is (202) 298-6399, your baud rate, no parity, eight (8) data bits and one (1) stop bit.
3. Crosstalk will ask you if you want to dial this number or return to the Crosstalk Main Menu. If you have no other numbers to enter at this time, you can press "ENTER" and dial the board. CrossTalk will dial the number you have entered.

You should hear your modem dial and connect (dialing sounds, two tones and static).

4. Once connected the remote computer will prompt you for your First Name, Last Flame and Password.
5. Once you have provided the information the remote computer will take you into the bulletin board.

DOWNLOADING

Once you are in the bulletin board ("remote") and have selected a file(s) you want to have "downloaded or sent to your computer ("local"), you must tell both computers what you are doing. First tell the remote which file(s) you want it to send to your computer, and, Second tell your computer where you want the incoming file to be received and what name to give it. The following are instructions on that process:

1. Once in the Files Subsystem after you have selected which file(s) you want to receive, select "D" for Download.
2. The bulletin board will ask the name of the file(s) you want to receive. (CAUTION You must type in the name(s) of the file(s) exactly, both first and last name.)
3. The bulletin board will ask you for the communications protocol you want it to use to send the file you have selected. We suggest using XMODEM (It is slower, but reliable). Select "X" for XMODEM.

You have now finished telling the "remote" computer what you want it to do. Before you can successfully download, you must tell your computer to accept the download.

4. Using CrossTalk, press “HOME”. This allows you to give commands to only your computer.
5. Type “CA” to enable the Capture command.
6. CrossTalk will ask the drive and name of the file you are asking to receive. You can designate where you want the file to be received. You can receive it onto your hard drive (C, probably) or onto a floppy drive (A, probably; If you choose this option be sure you have a floppy disk in that drive.)
7. Be sure to check on the CrossTalk menu the communications protocol you have selected. It must be the same as the communications protocol you have selected on the bulletin board. (XMODEM)
8. Once you have given CrossTalk the name of the file and the drive where you want the file to be received and set the communications protocols, you must return to the bulletin board (“remote”) to begin the download process. To do this press “HOME and then “ENTER”. You are now operating the remote computer again.
9. You can begin the download process by pressing “ENTER”.
10. *The bulletin board will display the number of “Mocks” the requested file contains, and will also display a running tabulation of the number of “blocks” sent. Once the download is complete the remote computer will display a message that the download was successful or not. If successful, you can download another file, move to another subsystem or log off.*

EXITING CROSSTALK

Once you have logged off the bulletin board and are ready to read the files you have downloaded, you must leave CrossTalk. To do this type “QU” for quit. This will return you to the C: prompt of your computer.

NEW USERS

If you have never called the bulletin board before, you will be asked some very basic information. Once YOU have made a connection to the bulletin board, you will be asked for your First Name, Last Name, City and State. After you have given the information you will be asked to supply a Password. Please choose a password that is easy for you to remember, but one that would be difficult for an outsider to guess. The remote computer will verify the information you have given it and will ask you if you want to change it, discormex or register. If there are no changes, then press "R" to register.

After you have answered and verified these questions, the bulletin board will provide a "newuser welcome". (See Figure 1, *on page 18*).

The bulletin board will now ask you some information regarding your computer's display features. Answer these according to your equipment.

Can your computer display Upper and Lower case? (Probably, yes)

Which graphics would you choose? If you are using a color monitor, choose "c" C)olor. If you do *not* have a color monitor do not choose color as your picture will be garbled. If you are using a monochrome monitor, the N N)one or the A A)scii choices will provide you with appropriate menus.

Choosing a Default Protocol. Whichever your computer uses is appropriate. (Probably XMODEM).

The bulletin board now provides you with another "welcome". his one contains the System Operators name and voice phone number (See Figure 2, *on page 19*).

The bulletin board will repeat the settings you have provided and will then take you into the system.

THE BULLETIN BOARD

You have now successfully entered all information needed to register. As soon as the bulletin board has received and verified all the information you will be directed to the Daily Bulletin Menu This is not optional Figure 3, on page 20 is an example of the Daily Bulletin Menu

THE DAILY BULLETIN MENU

The Daily Bulletin Menu is updated daily, usually by 2 pm Eastern time with information from that day. You will see the latest Daily Bulletin Men, and the past ten days Daily Bulletin Menus. We suggest that you read these bulletins as they scroll onto your screen. Additional information is available for each of the HEADLINE topics. (More on this in a minute.) The bulletin board will provide you with 19 lines of information and will then ask you if you want

More? Y)es, N)o, NS)Non-stop

If you want to read the daily bulletin menu from today only, you can choose 'NS' for non-stop after you finish reading the current screen and the rest of this menu Will scroll by without stopping. Once the Daily Bulletin Menu has been viewed you will be given a command line at the bottom of the screen:

Bulletin #(s) [1 thru 25], L)ist, N)ew (Press [ENTER] to quit)?

You may now type in the number of the headline topic for which you seek additional information. The bulletin board will scroll that bulletin for you and stop every 19 lines and wait for you to view it.

If you want to see the menu again you can press "L" and the system will replay the Daily Bulletin Menu for you.

If you want to have a list of bulletins that are new since the last time you logged on press "N" and the system will list the numbers of those bulletins. You can then type in one of the numbers listed and receive the full text of that bulletin. Repeat this for all bulletins you wish to see.

When you have viewed all bulletins you wish to see, press "*ENTER*" and the system will return you to the main menu.

THE MAINMENU

Once you have completed your reading of the bulletins and pressed "ENTER" the bulletin board shows you the following Main Menu (this is the Main Menu for those who choose the "No Graphics" option at registration):

NSRP ENVIRONMENTAL BULLETIN BOARD

C O M M A N D S

-- SYSTEM --	- u T I L m E s -	- ELSEWHERE --
[A]nswer Questions	[H]elp	[D]oors Subsystem
[B]ulletins	[?]List Functions	[F]iles Subsystem
[C]omment	[U]tilities	[G]oodbye
[I]nitial Welcome		[Q]uit to other Subsystems
[O]perator Page		

This is the "Main Menu" of the bulletin board. From this menu you can go anywhere, read anything on the system and change your current setting. All other menus are accessed from this menu.

The commands here are divided into three areas. Each is accessed by pressing the bracketed symbol and pressing "ENTER".

SYSTEM

- [A]nswer Questions - This option is for future use to enable the bulletin board to become interactive.
- [B]ulletins - You may return to the bulletin menus you saw when you signed on.
- [C]omment - You can leave a message for the SYSOP. If You have a complaint, suggestion or compliment please leave it. This is available only to the SYSOP. It will NOT be read by anyone else. (The SYSOP enjoys a good joke!!)
- [I]nitial Welcome - This command enables you to re-read the welcome". This is especially useful if you have misplaced the SYSOP's voice phone number.
- [O]perator Page - You can have the remote computer page the SYSOP. If he is available, he will respond to you on-line (You can have a written conversation). The symbol "AVL" appears in the bottom left corner of the screen during normal Collier, Shannon and Scott business hours to let you know that the SYSOP is available. However, the system is not continuously manned. Please use the "O" command only

if you are having difficulty.

UTILITIES

[H]elp - The system has on-line help.

[?]List Functions - The system will list those functions available to you.

[Utilities - This will take you to the utilities menu. You can change the settings you made earlier. This is especially useful if you upgrade your equipment and want to see the system in color.

ELSEWHERE

[D]oors Subsystem - his function is available only to the SYSOP.

[F]iles Subsystem - This will take you to the files. Collier Shannon and Scott has and will continue to place information into the Files Subsystem. You will be provided with another menu. More information regarding the Files Subsystem follows.

[G]oodbye - Use this command after you have completed Your review and are ready to log off. You can log off from any bulletin ‘board menu after you have viewed the bulletins.

[Q]uit to other Subsystems - Use this command to choose another subsystem It is probably easier to just choose the letter designation for such other subsystems from this menu.

At the bottom of the screen is listed the available letters to choose from. Input your choice and press “ENTER”.

An explanation of other menu screens follows.

FILES SYSTEM

The file system is probably the second most used optional function on the system (following the Main Menu). From this File System menu you can download documents and search files. The File System menu follows (again this is the "No Graphics" menu).

NSRP ENVIRONMENTAL BULLETIN BOARD

FILE SYSTEM

-FILE TRANSFER--FILE INFORMATION-	-UTILITIES-	-ELSEWHERE-
[D]ownload file	[L]ist files avail.	[H]elp (or ?)
[N]ew files listed	[Q]uit to other subsystems	[G]oodbye
		[S]earch file directories

This menu offers you the option of downloading a file from a directory, listing files available, listing new files since you last logged on, returning to another subsystem or ending (disconnect) the call.

The bulletin board files system has been broken down to several directories. There is a specific directory for each of the areas of environmental law. Each directory uses its name as the last name for each file in that directory. For example, a file referring to stormwater regulations would be found in the Clean Water Act directory. It could be named STORMWATR.CWA The last name "CWA" is also the name of the directory it is located. If a file is referred to in a daily bullet as "NEWREGULCAA", you know that it deals with the Clean Air Act and can be found in the Clean Air Act directory in the file system.

If you have read in one of the Daily Bulletins that additional information is available in a specific file in one or more directories and you wish to read that information this is the means to find the information You would first press "L" to list files available. This is helpful if the file name was not mentioned, or if it was named, but you have forgotten the name. The system will list all available files. It will ask you which directory you would like to see. If you know which directory the file you want is in type the name of the directory now. (A complete list of directories is included in *Figure 4, on page 22.*)

Once you have found a file you wish to read, you must download it to your computer. This transfer is done from this screen.

An brief explanation of the commands available on this menu follows:

[D]ownload - This is the command you use to transfer a file to your computer so it can be read it at your leisure. To effect this transfer, he in tie FULL name of the file you want. (CAUTION You must enter the file name precisely

as it appears.) Press “ENTER”. The bulletin board will ask you which format you want. We suggest you use ASCII especially if you want to print from Word Perfect. You will be asked which protocol you want. We suggest you use XMODEM (this is slower, but reliable). Depending upon which communications software you are using, you may need to tell your computer (the local) where *you want* to receive this file (See *Communicates Section page 3*). All documents on the bulletin board are in an ASCII format and can be retrieved in Word Perfect

Once you have answered all questions, the bulletin board will send the file to your computer. You will see the number of “blocks” the bulletin board says the file contains and as it is being sent you will see a running tabulation of the number of “blocks” that have been sent. This will help you to know how much time this transfer will take. It generally will not take long to send any file (usually under 30 seconds). Once the download is finished, the bulletin board will announce the outcome. If successful you can move on to another download or repeat the steps until you are successful.

After you have received a “downloaded” file and Logged off, you can retrieve the file into Word Perfect by pressing “CTRL-F5, 1, 3” and the location and name of the file you received. You can then print the document or read it on your monitor.

* * * Downloading sounds complicated, but once you have done it you will realize it is not as difficult as it appears.

[L]ist Files Available - This function will give you files from a specific directory or from all directories. Be sure to state which directory you want to see. If you do not, you will see them all.

[N]ew Files - This function will provide a list of files that have been added since your last log on.

[S]earch files - You have the option of searching a directory or all directories for a file name. Since file names are not one word designator, this function may have limited use. However, if you can remember only the first name of a document and not the last, this would be helpful in locating that file.

[Q]uit To Other Subsystem - This option allows you to return to the Main Menu or to the Utilities Subsystem.

[G]oodbye - You can log off from this subsystem.

UTILITIES SYSTEM

The Utilities System allows you to change your settings, password or check the clock. the Utilities System Menu appears as this (again this is the “No Graphics” version):

NSRP ENVIRONMENTAL BULLETIN BOARD		

UTILITIES SYSTEM		

-USER PROFILE/PREFERENCE-	-SYSTEM-	-ELSEWHERE-
[F]ile transfer protocol	[B]aud rate	[Q]uit to other
[G]raphics	[C]lock (time of day)	subsystems
[L]ines per page	[H]elp (or ?)	
[R]eview preferences	[P]assword changes	
	[S]ystem statistics	

The use of this menu should be limited. The most useful option here is the password change option. If you feel someone has access to your password, please change it. The instructions the bulletin board offers for this menu are simple and easy to follow. If it appears that the bulletin board is being abused, the SYSOP may cancel all passwords and require users to obtain and register a new one. Additional information will be provided if this becomes necessary.

The other useful functions offered here are the USER PROFILE/PREFERENCE options. If your equipment has changed you may need to change your options. Again the bulletin board instructions are “user friendly”.

LOGGING OFF

As we have seen from the previous instructions, a caller can log off from any menu once they have gotten past the Daily Bulletin Menu.

Logging off the bulletin board is completed by selecting "G" from any menu screen. You will then be asked if you want to disconnect. If this is your preference indicate so by choosing "Y". If you have hit "G" in error select "N" and continue. When you are ready to end the call, repeat the correct log off procedure.

SHORTCUTS

There are a number of time-saving shortcuts built into the bulletin board system. These can cut down the time needed to receive the information.

1. Logging On -After you have initially registered, you can log on from the first bulletin board prompt "First Name" with your first name last name and password all on that one line. You do not need to have the bulletin board prompt you for each answer individually. You do not need to include commas, just a space between each of the correct responses.
2. Frequent Calling - If you call often, you can save time by asking for only those bulletins you have not read. This is done by asking for N)ew whenever offered. The bulletin board system remembers the date of your last log on and will me you the items you have not already seen. This can be done with both Daily Bulletins and Files.
3. Logging **off** - Remember you can log off from any menu except the Daily Bulletin menu. If there are no files you want to "download" you can log off immediately after viewing the bulletins of your choice. You do not have to be at the Main Menu to log off.

IMPORTANT THINGS TO REMEMBER

1. **The phone number** to the NSRP Bulletin Board is (202) 298-6399.
2. The SYSOP is Rick Maas. His voice number is (202) 347-8570.
3. Modem protocols are N8:1. Any baud rate at 9600 and below is acceptable.
4. You are given 72 minutes of system time per day.
5. If You do not have computer interaction for five (5) minutes, the bulletin board A log you off automatically.
6. You are given three chances to log in before you are disconnected.
7. Be careful with your password.
8. New information should be available after 2pm EST.
9. If you wish to speak to an attorney regarding any item on the bulletin board call John L Wittenborn in the Collier, Shannon and Scott Environmental Section at (202) 342-8514.

Figure 1

NEWUSERS WELCOME

Welcome to the National Shipbuilding Research Program (“NSRP) Environmental Bulletin Board. Before entering the system you should understand your responsibilities as a user. Specifically, they are:

1. Actively encourage to promote the free exchange and discussion of information, ideas and opinions, except in the context that would compromise national security, violate proprietary rights, personal privacy, or applicable state/federal/local laws and regulations affecting telecommunications, or constitute a crime or liable.
2. Use your real name and password each time you access the system.
3. Do not disseminate your password to others and do not provide information about the NSRP Environmental Bulletin Board to persons not involved in the shipbuilding and ship repair community, public or private.
4. Every user explicitly acknowledges that the information services provided by Collier, Shannon & Scott through the NSRP Environmental Bulletin Board do not constitute legal advice nor establish any attorney/client relationship or privilege between Collier, Shannon & Scott and system users. All information is provided “as is” without warranty of any kind either express or implied, and all risk of acting upon information obtained from the NSRP Environmental Bulletin Board including the cost of any necessary remedy, shall be borne by those who choose to act upon such information, not upon the NSRP or the operator of the Bulletin Board service.
5. Any user may request additional information regarding items on the Environmental Bulletin Board by contacting Collier, Shannon & Scott directly. If appropriate, a separate attorney/client relationship may be required before specific advice or information may be provided. No charge will be assessed for any use of this Bulletin Board unless agreed to in advance by the system user.

Figure 2
WELCOME

```
+ ---  
| Welcome to the NSRP Environmental Bulletin Board  
| Dedicated to keeping the shipbuilding and ship  
| repair industry current on environmental  
| law developments.  
| your SYSOP is Rick Maas  
| Voice: 202-342-8570 Data 202298-6399  
+ --- +
```

This bulletin board is based on an IBM PC and the software for it is currently available for downloading. If you find a problem please leave a message using the "C"omments command when the system asks for a function.

This system answers the telephone at 300 baud, no parity, eight data bits (XMODEM), and 1 stop bit; If you get garbage on your screen when the system first connects, do not be alarmed or change your parameters to try and match this system

Figure 3

NSRP ENVIRONMENTAL BULLETIN BOARD

Daily Bulletin Menu
April 3, 1992

- 23.** Navy Agrees to \$65 Million Cleanup
- 22.** EPA Waste Minimization Data Criticized
- 21. Bush Administration to Introduce Marine Reauthorization Legislation
- 20. Senate Releases New RCRA Bill
- 19. EPA Hears Complaints in Clean Air Advisory Committee Meeting
- 18. EPA Prepares Briefing Documents for Options Considered for Exempting Subtitle (C) Wastes
- 17. Mobil Begins Construction of Double-Hull Barges

Daily Bulletin Menu
April 1, 1992

- 16. Legislation to Shield Company Audits from Lawsuits is circulated
- 15. EPA Issues More Flexible Groundwater Cleanup Directive
- 14. EPA Draft Municipal Superfund Cleanup Cost Policy
- 13. Corporate Officer Escapes Liability in RCRA Administrative Enforcement
- 12. Proposed Guidance on Air Toxic Offsets and Trading Policy Due in Sept.
- 11. House Subcommittee Continues Markup of RCRA Reauthorization
- 10. Industry Officials Request TRI Reporting Form by April 1
- 9. Justice to File Amicus Brief to Limit Citizen Suit Penalties Under EPRCA
- 8. Waxman to Sue EPA Over Delayed Clean Air Act Rules

Daily Bulletin Menu
March 27, 1992

- 7. EPA Issues Extension to Part 2 StormWater Application Deadline
- 6. Subcommittee Passes Amendment Allowing Ban on Out-of-State Waste
- 5. Labor Officials Testify on Validity of OMB Cost-Benefit Analysis

Daily Bulletin Menu
March 26, 1992

- 4.** Employee Pleads Guilty to CWA Criminal Felony Charge
- 3. Wastewater Dischargers May Be Able to Trade Water Pollution Credits
- 2. OMB Rejects EPA's Toxic Release Inventory Form

Daily Bulletin Board
March 25, 1992

1. Appeals Court Rules OSHA Must Complete Standards by August 31
25. Senate, House Could Pass Respective Clean Water Act Reauthorization Bills
24. Acid Rain S02 Allowance Trading May Begin This Summer

Figure 4

[Dir](#) [Contents](#)

Legis Current Legislative Events

CAA Clean Air Act (CAA)

CWA Clean Water Act (CWA)

RCRA Resource Conservation Recovery Act (RCRA)

Superfund/CERCLA

TSCA Toxic Substances Control Act (TXCA)

SARA Superfund Amendments and Reauthorization Act Title III/EPCRA

OSHA Occupational Safety and Health Administration (OSHA)

OLD Out-dated Daily Bulletins

GEN General Environmental Files

SECTION IX AND X

DEVELOPING ENVIRONMENTAL ISSUES FOR SHIPYARDS

CLEAN AIR ACT AMENDMENTS OF 1990

**William M. Guerry, Jr.
Collier, Shannon & Scott
3050 K Street, N.W.
Washington, D.C. 20007**

I. NATIONAL AMBIENT AIR QUALITY STANDARDS

- A. Classification of ozone non-attainment areas
- B. New requirements applicable to states and stationary sources
- C. Development of new control technique guideline applicable to VOCs and PM-10 emitted by shipyards

II. HAZARDOUS AIR POLLUTION

- A. List of regulated industrial categories and pollutants
 - 1. Schedule for developing technology-based standards for shipyards
- B. Technology-based standards
- C. Health-based standards
- D. Sudden accidental releases

III. PERMIT PROGRAM

- A. Statutory permit requirements
- B. Proposed EPA permit rule
- C. Conflict on degree of public participation
- D. Suggestions to mitigate impact of permit requirements

SUMMARY

MAJOR CLEAN AIR STATIONARY SOURCE IMPLEMENTATION DEADLINES

November 15, 1990: Enactment of Clean Air Act.

May 15, 1991: EPA must promulgate a list classifying all ozone non-attainment areas and establishing schedule for revising State Implementation Plans ("SIPs") (see Attachment 1).

November 15, 1991: (a) EPA must establish regulations establishing minimum requirements for State run permit program (still at OMB).
(b) EPA must publish a list of regulated source categories emitting hazardous air pollutants (still at OMB).

November 15, 1992: EPA must promulgate maximum achievable control technology-based emission standards ("MACT") for at least 41 categories of sources emitting hazardous air pollutants (see Attachment #2).

November 15, 1993: (a) EPA must promulgate 11 additional control techniques guidelines documents ("CTGs") and CTGs applicable to aerospace and shipbuilding.
(b) Each State Governor must submit a proposed permit program.
(c) States with significant ozone pollution must submit revisions to their implementation plan

which will reduce emissions of volatile organic compounds (“VOCs”) by 15 percent within six years and achieve timely attainment with the ozone standard.

November 15, 1994: EPA must promulgate MACT standards for 25 percent of listed categories including shipbuilding and repair (see Attachment #2).

November 15, 1995: Each State’s permit program must be approved or EPA will administer a permit program for that State.

1995-1996: Regulated “Major Sources” must apply to their state to obtain an air permit.

November 15, 1997: EPA must establish MACT regulations applicable to at least 50 percent of listed categories including EAF steel manufacturing and certain related metal processing industries (see Attachment #2).

November 15, 2000:

- (a) EAF steel manufacturers must achieve compliance with MACT standards.
- (b) EPA must have promulgated technology-based emission standards for all listed categories of sources emitting hazardous air pollutants.
- (c) EPA must also promulgate health-based standards if necessary, for the first group of 41 listed categories emitting hazardous air pollutants.

**Areas Violating the Ozone Standard 1987-89
Grouped by Classification**

CMSA/MSA/Non-MSA (Abbreviated Name)

Extreme Areas
Los Angeles, CA

Severe

Baltimore, MD
Chicago, IL-IN-WI
Houston, TX
Milwaukee, WI
Muskegon, MI
New York, NY-NJ-CT
Philadelphia, PA-NJ-DE-MD
San Diego, CA

Serious

Atlanta, GA
Bakersfield, CA
Baton Rouge, LA
Beaumont, TX
Boston, MA-NH
El Paso, TX
Fresno, CA
Hartford, CT
Huntington, WV-KY-OH
Parkersburg, WV-OH
Portsmouth, NH-ME
Providence, RI
Sacramento, CA
Sheboygan, WI
Springfield, MA
Washington, DC-MD-VA

Moderate

Atlantic City, NJ
Bowling Green, KY
Charleston, WV
Charlotte, NC-SC
Cincinnati, OH-KY-IN
Cleveland, OH
Dallas, TX
Dayton-Springfield, OH
Detroit, MI
Grand Rapids, MI
Greensboro, NC
Jefferson Co., NY
Keweenaw Co., WI
Knox Co., ME
Louisville, KY-IN
Memphis, TN-AR-MS
Miami, FL
Modesto, CA
Nashville, TN
Pittsburgh, PA

Portland, ME
Raleigh-Durham, NC
Reading, PA
Richmond, VA
Salt Lake City, UT
San Francisco-Oakland-San Jose
Santa Barbara, CA
Smyth Co., VA
St Louis, MO-IL
Toledo, OH
Visalia, CA
Worcester, MA

Marginal
Albany, NY
Allentown, PA-NJ
Altoona, PA
Birmingham, AL
Buffalo, NY
Canton, OH
Columbus, OH
Erie, PA
Essex Co., NY
Evansville, IN-KY
Fayetteville, NC
Greenbrier Co., WV
Greenville-Spartanburg, SC
Hancock Co., ME
Harrisburg, PA
Indianapolis, IN
Johnson C-Kingsport-Bristol
Johnstown, PA
Kansas City, MO-KS
Knoxville, TN
Lake Charles, LA
Lancaster, PA
Lewiston, ME
Lexington, KY
Lincoln Co., ME
Manchester, NH
Montgomery, AL
Norfolk, VA
Owensboro, KY
Paducah, KY
Poughkeepsie, NY
Scranton, PA
South Bend, IN
Stockton, CA
Sussex Co., DE
Tampa, FL
Waldo Co., ME
York, PA
Youngstown, OH Sharon, PA

Note: EPA may reclassify areas to another classification if their design value is within 5% of the other classification.

Areas Violating the Carbon Monoxide Standard, 1987-89

Grouped by Classification

Area Name

Serious Areas

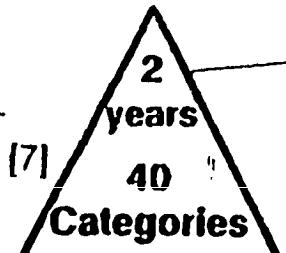
Los Angeles-Anaheim-Riverside, CA
Steubenville-Weirton, OH-WV Non-Mobile
Winnebago Co., WI (Oshkosh) Non-Mobile

Moderate Areas

Albuquerque, NM
Anchorage, AK
Baltimore, MD
Boston-Lawrence-Salem, MA-NH
Chico, CA
Cleveland-Akron-Lorain, OH
Colorado Springs, CO
Denver-Boulder, CO
Duluth, MN-WI
El Paso, TX
Fairbanks Id., AK (Non-MSA)
Fort Collins-Loveland, CO
Fresno, CA
Greensboro-Winston Salem-H. Point, NC
Hartford-New Britain-Middletown, CT
Josephine Co., OR (Grant Pass, Non-MSA)
Klamath Co., OR (Non-MSA)
Las Vegas, NV
Medford, OR
Memphis, TN-AR-MS
Minneapolis-St. Paul, MN-WI
Missoula Co., MT (Non-MSA)
Modesto, CA
New York-N. New Jer-Long Is., NY-NJ-CT
Philadelphia-Wilm-Trent, PA-NJ-DE-MD
Phoenix, AZ
Portland-Vancouver, OR-WA
Provo-Orem, UT
Raleigh-Durham, NC
Reno, NV
Sacramento, CA
San Diego, CA
San Francisco-Oakland-San Jose, CA
Seattle-Tacoma, WA
Spokane, WA
Stockton, CA
Syracuse, NY
Washington, DC-MD-VA

Note: EPA may reclassify areas to another classification if their design value is within 5% of the other classification.

November 1992



November 1994

$$7 + [41] = 48$$



November 1997

$$48 + [61] = 109$$

7 years - Completion of
50% of Listed Categories

$$9 + [64] = 173$$

10 years - Completion of
All of Listed Categories

Hazardous Organic NESHAP (production of 400 chemicals)

Dry Cleaners * [5]

Coke Ovens (charging, topside & door leaks) *12/31/97*
Actual Deadline

Chromium Anodizing *

Hard Chromium Electroplating *

Decorative Chromium Electroplating *

Ethylene Oxide Sterilization * (?)

Gasoline Marketing (Stage 1) * (?)

Magnetic Tapes (Surface Coating)

Polymers & Resins I [13]

Polymers & Resins II [13]

Wood Furniture (Surface Coating)

Degreasing Operations * (?)

Potassium Refineries (except cat crackers,
catalytic reformers, and sulfur plant process units/units)

Asbestos (revisions) * [5]

Solid Waste Treatment, Storage &
Disposal Facilities

Industrial Cooling Towers * (?)

Large Aircraft (Surface Coating)

Printing/Publishing (Surface Coating)

Shipbuilding and Repair
(Surface Coatings)

Hospital Sterilizers *

Secondary Lead Smelting

* Includes area sources

DRAFT BIN ASSIGNMENTS FOR THE EMISSIONS STANDARDS DEVELOPMENT SCHEDULE

PRELIMINARY/DRAFT

7-YEAR DRAFT BIN ASSIGNMENTS

Nov. 15, 1997

ACETAL RESINS PRODUCTION
ACRYLIC FIBERS/MODACRYLIC FIBERS PRODUCTION
AEROSOLS PRODUCTION
ASPHALT CONCRETE MANUFACTURING
ASPHALT PROCESSING
AUTO AND LIGHT DUTY TRUCK (SURFACE COATING)
BENZYLTRIMETHYLMONIUMCHLORIDE PRODUCTION
CADMIUM REFINING
CARBOXYMETHYLCELLULOSE PRODUCTION
CELLOPHANE PRODUCTION
CHELATING AGENTS PRODUCTION
CHLORONEB PRODUCTION
CHROMIUM REFRACTORIES PRODUCTION
CLAY PRODUCTS MANUFACTURING
COKE OVENS (PUSHING, QUENCHING, BATTERY STACKS)
ENGINE TEST FACILITIES
FERROALLOYS PRODUCTION
FLEXIBLE POLYURETHANE FOAM PRODUCTION
FORMALDEHYDE RESINS PRODUCTION
HYDROCHLORIC ACID PRODUCTION
HYDROGEN FLUORIDE PRODUCTION
INTEGRATED IRON & STEEL MANUFACTURING
INTERNAL COMBUSTION ENGINES
IRON FOUNDRIES
MINERAL WOOL PRODUCTION
MUNICIPAL LANDFILLS
NON-STAINLESS STEEL MANUFACTURING - EAF OPERATION
NYLON FIBERS PRODUCTION
NYLON PLASTICS PRODUCTION
OIL AND GAS PRODUCTION
PAPER AND OTHER WEBS (SURFACE COATING)

PHARMACEUTICALS PRODUCTION
PHENOLIC RESINS PRODUCTION
PHOSPHATE FERTILIZERS PRODUCTION
PHOTOGRAPHIC CHEMICALS PRODUCTION
POLYESTER RESINS PRODUCTION
POLYETHER POLYOLS PRODUCTION
POLYMETHYL METHACRYLATE RESINS PRODUCTION
POLYVINYL ACETATE EMULSIONS PRODUCTION
POLYVINYL ALCOHOL PRODUCTION
POLYVINYL BUTYRAL PRODUCTION
PORTLAND CEMENT MANUFACTURING
PRIMARY COPPER SMELTING
PRIMARY LEAD SMELTING
PROCESS HEATERS
PULP & PAPER PRODUCTION
RAYON PRODUCTION
REINFORCED PLASTIC COMPOSITES PRODUCTION
RUBBER CHEMICALS PRODUCTION
R-11 (BUTADIENE - FURFURAL-COTRIMER)
PRODUCTION
SEMICONDUCTORS MANUFACTURING
SEWAGE SLUDGE INCINERATION
STAINLESS STEEL MANUFACTURING - EAF
OPERATION
STEEL FOUNDRIES
STEEL PICKLING - HCl/HF PROCESS
TURBINES
WOOL FIBERGLASS MANUFACTURING
ZINC SMELTING

NATIONAL AMBIENT AIR QUALITY STANDARDS

Under the Clean Air Act in existence prior to 1990, EPA has established national health-based air quality standards that specify maximum ambient concentrations for ozone, carbon monoxide, sulfur oxides, nitrogen oxides (“NOx), lead and particulate matter.^{1/} The 1977 Clean Air Act set the year 1982 as the deadline for areas to attain compliance with all ambient air quality standards except ozone and carbon monoxide for which attainment was required by December 1987. Approximately 101 cities have been unable to comply with the air quality standards for ozone. Approximately forty-four cities have carbon monoxide levels that exceed the standards.

Under the 1990 Clean Air Act Amendments (“CAA” or “the new Act”) areas of the country which fail to meet ambient air quality standards (*i.e.*, “nonattainment areas”) have been classified according to the severity of the air pollution problem in that area. Each state containing a nonattainment area is required to submit a revised State Implementation Plan (“SIP”) which will implement new and tougher pollution control measures and ensure that the air quality standards are met by the specified deadline. The stringency of the control measures will be tied to the severity of the pollution problem in the area. Thus, the new control measures required to be taken by a source depend upon where the source is located. Areas with more serious pollution problems

1/ Ozone is not emitted directly but is formed in the atmosphere from the combination of volatile organic compounds (VOCs) and NOx in the presence of sunlight. Emissions of VOCs are primarily from a variety of “stationary source” (such as industrial sources using solvents, fuels, or coatings) and “mobile sources” (motor vehicles). NOx is a by-product of fuel combustion and is emitted by stationary sources and motor vehicles. Carbon monoxide comes primarily from the combustion of fuels by motor vehicles. Particulate matter is generated by soot and dust from diesel exhaust, wood stoves, road surfaces, forest burning and a wide variety of other activities.

are allowed more time to attain air quality standards, but are required to implement more stringent and numerous control requirements.

Generally, the Act expands the scope of new and existing stationary sources which must install emission control technology. Under the old Clean Air Act, existing "major stationary sources" which have the potential to emit ^{2/} (before add-on controls) more than 100 tons of VOCs per year in nonattainment areas must install reasonably available control technology ("RACT"). See Attachment #1. The new Act defines regulated "major sources" to include sources emitting less than 100 tons of VOCs in certain nonattainment areas. The old regulations applicable to nonattainment areas also require new "major sources" (100 tons) and "modifications" of existing major sources (that result in increased emissions of more than 40 tons) to undergo "new source review." "New source review" currently requires these sources to obtain construction permits, install technology to achieve the lowest achievable emission rate ("LAER") (*see* Attachment #1) and comply with an "offset" ratio of at least 1-to-1. The "offset" requirements mandate that these sources obtain enforceable emission reductions from the same source or other sources generally in the same nonattainment area. The offsets must be adequate to assure that the total tonnage of increased emissions from the new or modified source are offset by an equal or greater reduction in actual emissions. Depending on the classification of the nonattainment area, the new Act will significantly increase the current offset ratio. The new Act expands "new source review" (*i.e.*, construction permits and compliance with LAER) to apply to: (i) new sources in certain nonattainment areas that

2/ To determine whether a source has the potential to exceed the regulatory threshold of 100 tons per year, EPA multiplies a maximum hourly emission rate (determined by design capacity or maximum production) by 8760 operating hours per year.

emit less than 100 tons of VOCs; and (ii) modifications of existing major sources in certain nonattainment areas that result in an increase of less than 40 tons of VOCs. The new Act also expands existing provisions requiring certain transportation controls such as vehicle inspection and maintenance programs in ozone nonattainment areas.

Below is a discussion of the provisions which affect major stationary sources located in a nonattainment area.

A. Nonattainment Designations

In general, SIPS for nonattainment areas must provide for the implementation of RACT, develop a comprehensive inventory of actual emissions from all sources of the nonattainment pollutant, and require permits for new and modified major stationary sources. EPA may impose sanctions, including prohibiting federal funds for highway construction, and require more stringent offset requirements for new or modified sources in those states that fail to submit or implement a required SIP or SIP revision.

B. Classification of Ozone Nonattainment

Pursuant to the new Act's requirements, EPA has classified all ozone nonattainment areas as either "marginal," "moderate," "serious," "severe," and "extreme" on the basis of the following ambient ozone concentrations.

Area Class	Ozone Concentration (ppm)	Attainment Date
Marginal	0.121	up to 0.138 November 15, 1993
Moderate	0.138	up to 0.160 November 15, 1996
Serious	0.160	up to 0.180 November 15, 1999
Severe	0.180	up to 0.280 November 15, 2005
Extreme	0.280	and above November 15, 2010

A list of the cities included in each area is attached hereto as Attachment #2. A schedule summarizing the major submittals that will be required of States that contain ozone non-attainment areas is attached hereto as Attachment #3.

1. **"Marginal" Nonattainment Areas**

Revised **SIPs** for marginal nonattainment areas must demonstrate attainment with the ambient air quality **standards** within three years after the bill's enactment. Existing "major" **stationary** sources (with the potential to emit more than 100 tons of VOCs per year) in "marginal" areas must install **RACT** to control emissions of VOCs. New and modified "major sources" (100 tons) must comply with LAER and obtain construction permits pursuant to "new source review." This includes complying with an **offset** ratio of total required emission reductions to 'increased emissions from a new or modified source of at least 1.1 to 1. On or before November 15, 1992, the owner or operator of a designated stationary source of NOx or VOCs in a "marginal" area must submit (on an annual basis) an emission statement of VOC and NOx emissions.

2. **"Moderate" Ozone Nonattainment Areas**

Each state which contains a moderate area must make all the submissions applicable to "marginal" nonattainment areas. By November 15, 1993, states with moderate areas must also submit a SIP revision which will achieve (within 6 years of the bill's enactment) a 15 percent or greater reduction in VOCs from the level of emissions in 1990. **SIPs** for "moderate" areas shall provide for such specific annual reduction in emissions of VOCs and **NOx** as necessary to attain the national **primary** ambient air quality standards for ozone by November 15, 1996. NOx emissions will not be

in those areas where EPA determines that additional reductions of NOx would not contribute to attainment.

The offset ratio for new and modified “major stationary sources” (100 tons) in moderate areas which are subject to new source review is 1.15 to 1. All “major stationary sources” (with the potential to emit more than 100 tons of VOCs per year) and all VOC sources covered by a control techniques guideline (“CTG”) document must install RACT on or before May 31, 1995. EPA develops CTGS to provide a generic definitions of RACT for specified industrial categories. If a VOC source is covered by a CTG, the source will have to install RACT even if it emits less than 100 tons of VOCs. To date, EPA has issued and implemented 29 CIGs. If a CTG does not specify a particular de minimis exemption level, EPA usually exempts sources that emit less than three pounds of VOCs per hour, 15 pounds of VOCs per day, or ten tons of VOCs per year. The new Act requires EPA to issue by November 15, 1993, a CTG applicable to emissions of VOCs from coatings and solvents used in shipbuilding ship repair. See page 9-10 of this memorandum

3. Ozone Transport Regions

Major stationary sources in an “ozone transport region” will be regulated as if the area was classified as a moderate nonattainment area. The bill creates a Northeast ozone transport region encompassing the states of Maryland, Massachusetts, Pennsylvania, Delaware, New Jersey, New York, Connecticut, Vermont, New Hampshire, Rhode Island, Maine, and the District of Columbia metropolitan area. On or before November 15, 1992, states in the Northeast ozone transport region will have to submit a SIP revision. This SIP plan must require “major stationary sources” which have the

potential to emit 50 tons or more of VOCs per year, and VOC sources (regardless of size) which are covered by a CTG to install RACT.

4. "Serious" Ozone Nonattainment

States that contain serious areas must submit plans that meet the same requirements imposed on states with moderate areas. In addition to reducing VOC emissions by 15 percent by November 15, 1996, serious areas must achieve an average three percent reduction in VOC emissions over each consecutive three-year period until the attainment date. The area may also reduce NOx emissions in conjunction with reduction in VOC emissions. Serious areas must reach attainment for ozone by November 15, 1999. "Major stationary sources" in serious areas (those sources which emit or have the potential to emit at least 50 tons of VOCs per year) must install RACT. Modifications of major existing sources in serious nonattainment areas that result in a net increase of more than 25 tons over a five year period (as opposed to 40 tons under existing law) will trigger "new source review" requirements.^{3/} Modified new major sources (50 tons) subject to "new source review" must offset increased emissions at a ratio of 1.2 to 1.

5. "Severe" Ozone Nonattainment Areas

States that contain severe areas must submit plans that meet the requirement applicable to states with serious areas. In addition "major stationary sources" which emit or have the potential to emit 25 tons or more of VOCs must install RACT. New or modified major sources (25 tons) are required to offset increased emissions by a ratio of 1.3 to 1.

3/ Modified sources can elect to meet an internal offset at a ratio of at least 1.3 to 1 instead of complying with LAER.

Severe areas must reach the air quality standards within 15 years. If timely attainment is not achieved, each major stationary source in a severe area must pay a significant fee.

6. **"Extreme" Ozone Nonattainment Areas**

States that contain extreme areas must adhere to the requirements imposed on states with severe areas. Major sources which emit or have the potential to emit more than 10 tons of VOCs per year must install RACT. Any change of a major stationary source (10 tons) which results in any increase in emissions will trigger "new source review" requirements.^{4/} Thus, there is no de minimis exemption. New and modified stationary sources subject to "new source review" must reduce the net emissions of VOCs to meet a 1.5 to 1 ratio.

Extreme areas must also submit a plan requiring within eight years of the date of submission of the plan that each new, modified, and existing electric utility, industrial and commercial boiler which emits more than 25 tons of NOx per year either burn natural gas, methanol, ethanol, or comparably low polluting fuel as its primary fuel, or use advanced control technology for reduction of emissions of NOx.

Extreme areas must achieve attainment within 20 years.

C. **Major Sources Emitting NOx**

The provisions required for "major stationary sources" of VOCs shall also apply to "major stationary sources" of NOX. A source is a "major source" if it has the potential to emit 100 tons of NOx in marginal or moderate ozone nonattainment areas, 50 tons of NOx in serious ozone nonattainment areas, 25 tons of NOx in severe ozone

^{4/} Modified sources can elect to meet an internal offset at a ratio of at least 13 to 1 instead of complying with LAER.

nonattainment areas or 10 tons of NOx in extreme ozone nonattainment areas. A NC source covered by a CTG that is in a nonattainment area (other than moderate) would also become subject to the VOC source requirements. Major sources of NOx in ozone nonattainment areas may have to install low NOx burners to comply with RAC requirements. The plan provisions required for major VOC sources will not apply to those major NOx sources for which EPA determines (when the Administrator approves a SIP or SIP revision) that net air quality benefits are greater in the absence of reductions of NOx from the source concerned. Ozone is formed from the combination of sunlight and emissions of hydrocarbons and NOX. Generally, reducing emissions of NOx will reduce the amount of ozone formed when the ratio of hydrocarbons to NOx is greater than 12 to 1. If more NOx is present, then reducing the NOx will have no effect upon ozone formation until the ratio of 12 to 1 is achieved. This means that a source of NOx in a nonattainment area is more likely to become subject to regulation if only a small concentration of NOx is emitted in that area. If EPA determines that “excess reductions” in emissions of NOx would result from imposing the VOC requirements, then the Agency may limit the application of the VOC requirements to the extent necessary to avoid achieving such excess reductions. “Excess NOx reductions” are defined as emission reductions for which the Administrator determines that net air quality benefits are greater in the absence of such reductions.

The new Act also requires EPA in conjunction with the National Academy of Sciences to conduct a study on the extent to which NOx and VOC emissions cause ozone formation and the effect of reducing NOx emissions. After the study is submitted to Congress, a person may petition EPA for a determination of whether certain VOC requirements should not apply to major sources of NOx because such requiremen

would result in "excess reductions" of NOx or no net air quality benefits. EPA must grant or deny such a petition within 6 months after its filing.

D. Sanctions for Failure to Attain

The sanctions available to EPA for states that fail to make reasonable efforts to submit or carry out an adequate SIP, include denying federal highway funding, or increasing off-set requirements to a ratio of at least 2 to 1.

E. Federal Ozone Measures

1. Control Techniques Guidelines

Control Technique Guidelines ("CTGs") provide a generic definition of RACT for specified industrial categories. EPA has issued 29 CTGs to date. EPA is required to publish a list of at least 11 additional categories of stationary sources which make the most significant contribution to the formation of ozone pollution. EPA is currently studying whether it needs to adopt new CTGs for clean-up solvents, adhesives and industrial coatings. Within three years of the bill's enactment EPA is to issue CTGs for at least 11 additional categories. In addition, EPA is required to issue CIGs for other source categories if deemed necessary to further the purposes of this legislation.

2. Shipbuilding and Ship Repair

By November 15, 1993, EPA must issue a CTG identifying "best available control measures" to reduce emissions of VOCs and particulate matter smaller than 10 microns in size (PM-10) from solvents and coatings used in the shipbuilding and ship repair industry.^{5/} Such CTGs must provide for scheduled reductions in these VOC emissions

^{5/} "Best Available Controls" is defined as the degree of emission reductions achievable through the application of the most effective equipment measures, process or techniques, considering technological and economic feasibility as well as health and environmental impacts.

within 10 years of the CTG's promulgation We expect that the CTG for VOCs emitted from coatings and paints used by shipyards will probably incorporate VOC limits that are comparable to those limits established by the State of California South Coast Air Quality Management District See Attachment #4. It is our understanding that relatively expensive marine paints are currently available that can meet the California standards.

3 . Emissions From Loading and Vessels

EPA is required to issue standards applicable to the emission of VOCs or any other air pollutant from the loading or unloading of marine tank vessels. Such standards shall require the use of RACT. To the extent practicable, these standards are to apply to loading and unloading facilities and not to marine vessels.

F. Carbon Monoxide Nonattainment

Areas designated as "serious" for nonattainment with carbon monoxide will have to regulate stationary sources that have the potential to emit 50 tons of carbon monoxide as "major sources" if such sources contribute significantly to the carbon monoxide level.

G. Particulate Matter (PM-10) Nonattainment

Permits would be required for the construction and operation of new and modified major stationary sources of PM-10 in "moderate areas." Each area identified in 52 Fed. Reg. 29383, 29385 (Aug. 7, 1987) as a Group I area will be designated as "moderate" nonattainment for PM-10. See Attachment #5. Major sources (with the potential to emit over 100 tons of PM-10) in moderate areas, would have to implement reasonably available control measures no later than December 10, 1993 or four years after classification of the area "Moderate areas" that fail to attain the PM-10 NAAQS.

by December 31, 1994 (or within six years of the area's classification), will be reclassified as a "serious area" In "serious" areas, major sources (with the potential to emit at least 70 tons of PM-10) would have to install best available control measures no later than four years after that area's classification

BACT/LAER/RACT CLEARINGHOUSE

A clearinghouse of information has been established by the U.S. Environmental Protection Agency to identify Best Available Control Technology ("BACT"), Lowest Achievable Emission Rate ("LAER") and Reasonably Available Control Technology ("RACT") for various industrial categories and subcategories. The data base consists of a four volume set available from the National Technical Information Service ("NTIS") (document number PB90-259714) at a cost of \$144.00 per set. Individual BACT/LAER/RACT source information is available from EPA by contacting Mr. Bob Plaszczak by calling (919) 541-5432 or by mail at: U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, Mail Drop 13.

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Areas Violating the Ozone Standard 1987-89
Grouped by Classification

CMSA/MSA/Non-MSA (Abbreviated Name)

Extrme Areas
Los Angeles, CA

Severe
Baltimore, MD
Chicago, IL-IN-WI
Houston, TX
Milwaukee, WI
Muakagon, MI
New York, NY-NJ-CT
Philadelphia, PA-NJ-DE-MD
San Diago, CA

Serious
Atlanta, GA
Bakersfield, CA
Baton Rouge, LA
Beaumont, TX
Boston, MA-NH
El Paso, TX
Fresno, CA
Hartford, CT
Huntington, WV-ICY-OH
Parkersburg, MV-OH
Portsmouth, NH-ME
Providence, RI
Sacramanto, CA
Sheboygan, WI
Springfield, MA
Washington, DC-MD-VA

Moderate
Atlantic City, NJ
Bowling Green, KY
Charleston, MV
Charlotte, NC-SC
Cincinnati, OH-KY-IN
Cleveland, OH
Dallas, TX
Dayton-Springfield, OH
Detroit, MI
Grand Rapids, MI
Greensboro, NC
Jefferson Co, NY
Kewaunee Co, WI
Knox Co, ME
Louisville, KY-IN
Manphis, TN-AR-MS
Miant, FL
Modesto, CA
Nashville, TN
Pittsburgh, PA

Portland, ME
Raleigh-Durham, NC
Reading, PA
Richmond, VA
salt Lake City, UT
San Francisco-Oakl'd-San Jose
Santa Bartia, CA
Smyth Co, VA
St Louis, MO-IL
Toledo, OH
Visalia, CA
Worcestar, MA

Marginal
Albany, NY
Allontown, PA-NJ
Altoona, PA
Biraingham, AL
Buffalo, NY
Canton, OH
Colombus, OH
Eria, PA
Essex CO, NY
Evansvilla, IN-KY
Fayettavilla, NC
Greenbraier Co, WV
Greenville-Spartanburg, SC
Hancoak Co, ME
Harrisburg, PA
Indianapolis, IN
Johnson C-Kingsport-Bristol
Johnstown, PA
Kansas City, MO-KS
Knoxville, TN
Lake Charles, LA
Lancastes, PA
Lewiston, MS
Laxington, KY
Lincoln Co, MS
Manchester, NH
Montgonery, AL
Norfolk, VA
Owansborot KY
Paducah, KY
Poughkespsia, NY
Scranton, PA
south Band, IN
Stockton, CA
Sussex Co, DE
Tampa, FL
Maldo Co, ME
York, PA
Youngstown, OH sharon, PA

Note: EPA may reclassify areas to another classification
their design value is within 5% of the other
classification.

Areas Violating the Carbon Monoxide Standard, 1987-89**Grouped by Classification****Area Name****Serious Areas**

Los Angeles-Anaheim-Riverside, CA
Steubenville-Waitton, OH-WV Non-Mobile
Winnebago Co, WI (Oshkosh) Non-Mobile

Moderate Areas

Albuquerque, NM
Anchorage, AK
Baltimore, MD
Boston-Lawrence-Salem, MA-NH
Chico, CA
Cleveland-Akron-Lorain, OH
Colorado Springs, CO
Denver-Boulder, CO
Duluth, MN-WI
El Paso, TX
Fairbanks Ed, AK (Non-MSA)
Fort Collins-Loveland, CO
Fresno, CA
Greensboro-Winston Salem-H. Point, NC
Hartford-New Britain-Middletown, CT
Josephine Co, OR (Grant Pass, Non-MSA)
Klamath Co, OR (Non-MSA)
Las Vegas, NV
Medford, OR
Memphis, TN-AR-MS
Minneapolis-St. Paul, MN-WI
Missoula Co, MT (Non-MSA)
Modesto, CA
New York-N. New Jer-Long Is, NY-NJ-CT
Philadelphia-Wilm-Trent, PA-NJ-DE-MD
Phoenix, AZ
Portland-Vancouver, OR-WA
Provo-Orem, UT
Raleigh-Durham, NC
Reno, NV
Sacramento, CA
San Diego, CA
San Francisco-Oakland-San Jose, CA
Seattle-Tacoma, WA
Spokane, WA
Stockton, CA
Syracuse, NY
Washington, DC-MD-VA

Note: EPA may reclassify areas to another classification if their design value is within 5% of the other classification.

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provided in this preamble is therefore intended to guide States and to help ensure that they prepare and submit SIP's or SIP revisions that adequately

comply with the title I provisions. For quick reference, title I submittals and other actions concerning ozone and CO nonattainment areas required during the

early years following the November 1990 enactment of the 1990 CAAA listed chronologically (by the date action is due) on Table 1.

TABLE 1.—MAJOR REQUIRED STATE SUBMITTALS AND ACTIONS

Submittal/action	Ozone classification					CO classification	
	Marginal	Moderate	Serious	Severe	Extreme	Moderate	Severe
By March 15, 1991 (120 days after enactment): A request for more time to study boundaries for serious + area that was designated and classified as of enactment (due 45 days after classification).			X	X	X		X
List of all areas with proposed designations and boundaries (except boundaries for serious + areas with requests for more time to study).	X	X	X	X	X	X	X
A request for more time to study boundaries for serious + area that was designated and classified at 240 days after enactment (requested to be in March 15, 1991, submittal; latest date for request is August 27, 1991).			X	X	X		X
Commitment to submit SIP revision to correct I/M program (i.e., implement previously-required program) ("immediate submittal" of revision for I/M) ¹ .	X						X
Commitment to submit SIP revision to implement basic I/M program ("immediate submittal" of revision for I/M) (plus serious areas where urbanized population < 200,000) ² .			X				
By May 15, 1991 (6 months after enactment): Submit RACT Corrections.	X	X	X	X	X		
Northeast ozone transport commission convenes (applies to Northeast transport region).							
By May 15, 1992 (18 months after enactment): Commence actions to adopt and implement enhanced monitoring program requirements.			X	X	X		
By November 15, 1992 (24 months after enactment): Submit comprehensive emission inventory.	X	X	X	X	X	X	X
Submit requirements for emission statements.	X	X	X	X	X	X	X
Submit VOC - RACT rules (existing CTG's; non-CTG major sources).	X	X	X	X	X	X	X
Submit NSR rules.	X	X	X	X	X	X	X
Submit Stage II vapor recovery program.							
Submit Enhanced I/M program; begin implementation ³ .	X	X	X	X	X	X	X
Submit requirements for transport region (VOC, NO, RACT and NSR; Enhanced I/M) (applies across transport region).			X	X	X		
Submit conformity requirements ⁴ .	X	X	X	X	X	X	X
Submit measure for reducing VMT.							
Submit CO attainment demonstration.							
Submit contingency measures (if VMT forecasts exceeded).							
Submit transportation control measures (TCM's).							
Submit revision requiring employer trip reduction programs (25% vehicle occupancy rate reductions).							
Submit energy-based fuel program.							
By November 15, 1993 (36 months after enactment): Submit "15% SIP" (i.e., measures showing 15% reduction in VOC baseline).	X	X	X	X	X		
Submit demonstration re: additional VOC, NO, reductions as necessary to attain.	X						
Submit NSR program (CO).							
Submit contingency measures for failures to meet milestones.			X	X	X	X	X
By November 15, 1994 (4 years after enactment): Submit attainment demonstration (photochemical dispersion modeling).			X	X	X		
Submit RPP demonstration showing 3% average annual reductions commencing 6 years after enactment.			X	X	X		
Submit clean-fuel vehicle program.			X	X	X		
Submit Stage II program (or "reflect comparable measures") in transport region.			X	X	X		
Submit plans to incorporate EPA's emission diagnostic rules (estimated time).	X	X	X	X	X		

¹ Certain submittals/actions may actually be required before the end of the time period specified. Check the narrative portion of the document for submittal time schedules. Also, the NO_x requirements of CAA section 162(f) will be addressed in supplements to the General Preamble.

² See Preamble discussion regarding compliance with submittal dates.

³ Submittal dates will be delayed pending EPA rulemaking.

⁴ Applies to areas with design values > 12.7 ppm.

⁵ As applicable in regards to Title II requirements.

The EPA's interpretation of title I provisions provided in the preamble will also provide a basis for subsequent EPA

approval or disapproval of SIP submittals concerning NAAQS nonattainment areas. While this

preamble should reflect the major the SIP requirements under title I unique circumstances or as yet

(Adopted November 4, 1988)(Armended May 5,1989
(Amended June 2,1989

January 3, 1990
(1106AECP)

RULE 1106. MARINE COATING OPERATIONS

(a) Definitions

For the purpose of this rule the following definitions shall apply:

- (1) AIR DRIED COATING is any coating that is cured at a temperature below 90 .C (194°F).
- (2) AIR DRIED SINGLE COMPONENT ALKYD or VINYL FLAT or SEMIGLOSS COATING is any maintenance coating having an alkyd or vinyl base which is a single component coating and is air dried. .
- (3) ANTENNA COATING is any coaring applied to equipment and associated structural appurtenances which are used to receive or transmit electromagnetic signals.
- (4) ANTIFOULING COATING Is any coaring applied to the underwater portion of a vessel to prevent or reduce the attachment of biological organisms and registered with the Environmental Protection Agency (EPA) as a pesticide.
- (5) BAKED COATING is any coating that is cured at a temperature at or **above 90°C (194°F)**.
- (6) ELASTOMERIC ADHESIVE is any adhesive containing natural or synthetic rubber.
- (7) EXEMPT COMPOUNDS are any of the following compounds: 1.1. 1. trichloroethane. methylene chloride. uifluoromethane (FC-23), trichlorouifluororoethane (CFC- 113), dichlorodifluoromethane (CFC-12), trichlorldluoromethane (CFC- 11). chlorodifluoromethane (CFC-22), dichlorotetrafluoroethane (CFCO -114). and chloropertafluoroethane (CFC-115).
- (8) EXTREME HIGH GLOSS COATING is any coating which achieves at **least 95 percent reflectance on a 60° meter when tested by ASTM Method D-523.**

(9) GRAMS OF VOC PER LITER OF COATING, LESS WATER AND LESS EXEMPT COMPOUNDS is the weight of VOC per combined volume of VOC and coating solids and can be calculated by the following equation:

Grams of VOC per Liter of Coating Less Water

$$\begin{aligned} \text{and Less Exempt Compounds} &= \frac{W_s - W_w}{V_m - V_w} \cdot V_{es} \\ &= \frac{W_s - W_w}{V_m - V_w} \cdot V_{es} \end{aligned}$$

Where: W_s = weight of volatile compounds in grams

W_w = weight of water in grams

V_{es} = weight of exempt compounds in grams

V_m = volume of material in liters

V_w = volume of water in liters

V_{es} = volume of exempt compounds in liters

- (10) HEAT RESISTANT COATING is any coating which during normal use must withstand temperatures of at least 204°C (400°F).
- (11) HIGH GLOSS COATING is any coating which achieves at least 85 percent reflectance on a 60 meter when tested by ASTM Method D-523.
- (12) HIGH TEMPERATURE COATING is any coating which must **withstand temperatures of at least 426°C (800°F)**.
- (13) LOW ACTIVATION INTERIOR COATING is a coating used on interior surfaces aboard ships to minimize the activation of pigments on painted surfaces within a radiation environment.
- (14) MARINE COATING is any coating except unsaturated polyester resin (fiberglass) coatings, containing volatile organic materials and applied by brush, spray, roller, or other means to ships boats, and their appurtenances and to buoys and oil drilling rigs intended for the marine environment.
- (15) METALLIC HEAT RESISTANT COATING is any coating which contains more than 5 grins of metal particles per liter as applied and **which must withstand temperatures over 80°C (175°F)**.
- (16) NAVIGATIONAL AIDS are buoys or other Coast Guard waterway markers.

- (17) PRETREATMENT WASH PRIMER is a coating which contains at least 1/2 percent acids, by weight, to provide surface etching and is applied directly to metal surfaces to provide corrosion resistance, adhesion, and ease of stripping.
- (18) REPAIR AND MAINTENANCE THERMOPLASTIC COATING is a resin-heating coating in which the resin becomes pliable with the application of heat, such as vinyl, chlorinated rubber, or bituminous coatings.
- (19) SEALANT FOR WIRE-SPRAYED ALUMINUM is a coating of up to one mil (0.001 inch) in thickness of an epoxy material which is reduced for application with an equal part of an appropriate solvent (naphtha, or ethylene glycol monoethyl ether).
- (20) SPECIAL MARKING COATING is any coating used for items such as flight decks, ships' numbers, and other safety/identification applications.
- (21) TACK COAT is an epoxy coating of up to two roils thick applied to an existing epoxy coating which has aged beyond the time limit specified by the manufacturer for application of the next coat,
- (22) TOUCH-UP is a coating incidental to the main coating process but necessary to cover minor imperfections.
- (23) TWO-COMPONENT COATING is a coating requiring the addition of a separate reactive resin, commonly known as a catalyst, before application to form an acceptable dry film.
- (24) UNDERSEA WEAPONS SYSTEM is any or all components of a weapons system that is launched or fired underwater.
- (25) VOLATILE ORGANIC COM POUND (VOC) is any volatile compound of carbon, excluding methane, when monoxide, carbon dioxide, carbonic acid, metallic carbides or carbonates, ammonium carbonate and exempt compounds listed in subparagraph (a)(7).
- (26) WIRE-SPRAYED ALLUMINUM is a multi-idummum coating applied to a steel substrate using oxygen lucted combustion spray methods.

(b) Requirements

(1) Except as otherwise provided in this rule, a person shall not apply a marine coating with a VOC content in excess of the following limits expressed as grams of VOC per liter of coating applied, less water and less exempt solvents:

	<u>After Sept,1,1989</u>	<u>After Sept. 1, 1991</u>
Baked Coatings	360 grams/liter (2.9 lb/gal)	275 grams/liter (2.3 lb/gal)
Air-Dried Single.	420 gms/liter	340 gms/liter
Component Alkyd or	3.5 lbs/gal)	(2.8 lbs/gal)
Vinyl Flat or Semi		
Gloss Coatings		
Two-Component	340 grams/liter	340 grams/liter
Coatings		

(2) Specialty Coating Limits

A person shall not apply a marine coating with a VOC content in excess of the following limits, expressed as grams of VOC per liter of coating applied, less water and less exempt solvents;

<u>Coating Type</u>	<u>Effective Sept. 1, 1989</u>		<u>Effective Sept. L 1991</u>	
	<u>Baked</u>	<u>Air-Dried</u>	<u>Baked</u>	<u>Air-Dried</u>
Heat Resistant	445	520	360	420
Metatallic Heat Resistant	-	530	-	530
High Temp	-	650		500
Pre-treatment Wash Primer	780	780	780	780
Underwater Weapons Systems	360	420	275	340

Elastomeric				
Adhesives with				
15% by weight				
Natural or				
Synthetic Rubber	730		730	
Solvent-based				
Inorganic Zinc	650		650	
Navigational Aids	550		340	
Sealant for				
wire-sprayed				
aluminum	..	610	610	
Special Marking		490	490	
Tack Coat	6 1 0		610	=
Low Activation				
Interior Coating	490		420	
Repair and Maintenance				
Thermoplastic	650		550	
Extreme High Gloss				
Coating	420	490	420	490
Antenna Coating	-	680		530
	Effective Sept. 1, 1989		Effective Sept. 1, 1992	
<u>Coating Type</u>	Baked	Air-Dried	Baked	Air-Dried
Antifouiam		440		400
High Gloss	360	420	275	340

(3) Thinning and Diluting of Coatings

Coatings subject to the provisions of this rule maybe thinned or diluted to suit atmospheric conditions of temperature and humidity in accordance with the coating manufactures recommendation as stated by the manufacturer on the container label or in the shipping documentation.

Any such thinning or diluting shall not cause the VOC content of coating to exceed its applicable limit as stated in this rule. This requirement shall not apply to the thinning of marine coatings with water.

(4) Solvent including waste solvent shall not be stored or disposed of in such a manner as will cause or allow its evaporation into the atmosphere.

(c) Prohibition of Specification

- (1) A person shall not solicit or require any other person to use, in the District, any coating or combination of coatings to be applied to any marine vessel or marine component subject to the provisions of this rule that does not meet the limits and requirements of this rule, or of an Alternative Emission Control (AEC) Plan approved pursuant to the provisions of paragraph (f) of this rule.
- (2) The requirements of this paragraph shall apply to all written or oral agreements executed or entered into after November 4, 1988.

(d) Methods of Analysis

The VOC content of coatings subject to the provisions of this rule shall be determined by the procedures detailed in the District's "Laboratory Methods of Analysis for Enforcement Samples" manual.

(e) Control Device Equivalent

- (1) The emission limits of paragraph (b) may be achieved by any other emission control process, such as incineration or adsorption, approved by the Executive Officer.
- (2) The use of coatings with VOC contents in excess of the limits specified in paragraph (b) shall be allowed provided the emissions of VOC to the atmosphere from the use of such coatings is reduced to a level which is equivalent to the use of coatings which comply with the limits of paragraph (b).

(f) **Alternative Emission Control Plan**

An owner/operator may achieve compliance with the requirements of paragraph (b) by emissions averaging methods, provided the applicant submits an Alternative Emission Control Plan that is enforceable by the District on a daily basis and receives approval in writing from the Executive Officer prior to implementation. The Alternative Emission Control Plan shall means of an Alternative Emission Control Plan pursuant to Rule 108,

- (f) Contain, as a minimum, all data, records, and other information necessary to determine eligibility for alternative emission control including, but not limited to:
 - (A) A list of equipment subject to alternative emission control; and
 - (B) Daily hours of utilization for applicable equipment; and
 - (C) Estimated emission of VOC for each operation on a daily basis including cleanup and surface preparation.
- (2) Present the methodology for estimation of equivalency of emission reductions under the proposed Alternative Emission Control Plan as compared to either the emission reductions required by the applicable rules or to actual emissions, whichever is less.
- (3) Demonstrate to the satisfaction of the Executive Officer that the difference between the emissions allowed by existing regulations and any lower actual emissions will not be used to increase emissions from the same or another source.
- (4) Demonstrate that the permit units subject to the specified rule emission limitations are in compliance with, or on an approved schedule for compliance with, all applicable District rules.
- (5) Be submitted for approval of any subsequent update or revision prior to modification of equipment subject to alternative emission control.
A violation of an approved plan shall be a violation of Rule 1106. Sources operating under an approved plan shall report all violations of the plan to the Executive Officer within 48 hours.

(g) **Exemptions**

The provisions of this rule shall not apply to:

- (1) Marine coatings applied to interior surfaces of potable water containers.
- (2) Touch-up Coatings
- (3) Marine coatings purchased in containers of one quart or less and applied to pleasure craft.
- (4) Antifoulant coatings applied to aluminum hulls.

(h) **Effective Dates**

- (1) The operator of any marine coating operation subject to this rule shall comply with the provisions of this rule in accordance with the effective dates indicated in the requirements section of this rule.
- (2) Until the effective dates indicated in the requirements section of this rule,= the operator of any marine coating operation shall comply with the provisions of Rule 442 or this rule, but is not required to comply with both
- (3) Any marine coating operation or facility which is exempt from all or a portion of this rule shall comply with the provisions of Rule 442
 - (i) Recordkeeping
Notwithstanding provisions of paragraph (g), records shall be maintained pursuant to Rule 109.

nearest 1 $\mu\text{g}/\text{m}^3$ before comparison with the annual primary standard (fractional values equal to or greater than 0.5 are to be rounded up)." is corrected to read "The expected annual arithmetic mean is rounded to the nearest 1 $\mu\text{g}/\text{m}^3$ before comparison with the annual standards (fractional values equal to or greater than 0.5 are to be rounded up)."

18. On page 24667, column 3, Section 3.0 of Appendix K, change "Computational formulas for the 24-hour standard" to "Computational formulas for the 24-hour standards".

19. On page 24668, column 1, line 17 of Appendix K, change "e" to "q" and line 24, change "years" to "year".

20. On page 24668, the following formulas in Appendix K are corrected:

Formula (2) is corrected to read

$$e = \sum_{q=1}^4 e_q$$

formula (3) is corrected to read

$$e_q = (N_q/m_q) \times \sum_{j=1}^{m_q} (v_j/k_j)$$

formula (4) is corrected to read

$$\bar{x}_q = (1/n_q) \times \sum_{i=1}^{n_q} x_i$$

and lines 6 and 7 under formula (4), which read "x_i=the ith concentration value recorded in the quarter." are corrected to read "x_i=the ith concentration value recorded in the quarter."

formula (5) is corrected to read

$$\bar{x} = (1/4) \times \sum_{q=1}^4 \bar{x}_q$$

21. On page 24669, column 2, line 4 of Appendix K, change "means" to "mean".

22. On page 24669 of Appendix K, the formula which reads

$$\bar{x} = (1/4) \times (52.4 + 75.3 + 82.1 + 63.2) = 68.23$$

is corrected to read

$$\bar{x} = (1/4) \times (52.4 + 75.3 + 82.1 + 63.2) = 68.23$$

23. On page 24669, formula (6) in Appendix K is corrected to read

$$\bar{x}_q = (1/m_q) \times \sum_{j=1}^{m_q} \sum_{i=1}^{k_j} (x_{ij}/k_j)$$

[FR Doc. 87-17983 Filed 8-6-87; 8:45 am]
BILLING CODE 6560-00-00

40 CFR Parts 51 and 52

[AD-FRL-3244-6]

PM₁₀ Group I and Group II Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: List of PM₁₀ Group I and Group II areas.

SUMMARY: On July 1, 1987, the EPA promulgated national ambient air quality standards (NAAQS) for particulate matter with an aerometric diameter of a nominal 10 micron or less (PM₁₀) (see 52 FR 24634). The EPA also promulgated policies and regulations by which it will implement the PM₁₀ NAAQS (52 FR 24672). In accordance with these policies, EPA has categorized areas of the Nation into three groups based on the likelihood that the existing State implementation plan (SIP) must be revised to protect the PM₁₀ NAAQS. Areas with a strong likelihood of violating the PM₁₀ NAAQS and requiring substantial SIP revisions were placed in Group I; areas where attainment of the PM₁₀ NAAQS is uncertain and the SIP may require only slight adjustment were placed in Group II; and areas with a strong likelihood of attaining the PM₁₀ NAAQS, and therefore probably having an adequate control strategy, were placed in Group III.

By this notice, EPA is identifying the Group I and Group II areas in each State. The remainder of the States not in Group I or II is placed in Group III.

ADDRESSSES: Information supporting the placement of each area in Group I, II, or III can be obtained from the respective EPA Regional Office which services the particular State. The addresses of the Regional Offices are:

- State Air Programs Branch, EPA, Region I, JFK Federal Building, Boston, Massachusetts 02203.

- Air Programs Branch, EPA, Region II, 26 Federal Plaza, New York, New York 10278.

- Air Programs Branch, EPA, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107.

- Air Programs Branch, EPA, Region IV, 345 Courtland Street, N.E., Atlanta, Georgia 30365.

- Air and Radiation Branch, EPA, Region V, 230 South Dearborn Street, Chicago, Illinois 60604.

- Air Programs Branch, EPA, Region VI, Allied Bank Tower, 1445 Ross Avenue, Dallas, Texas 75202-2733.

- Air Branch, EPA, Region VII, 728 Minnesota Avenue, Kansas City, Kansas 66101.

- Air Programs Branch, EPA, Region VIII, 999 18th Street, Suite 1300 Denver, Colorado 80202-2413.

- Air Programs Branch, EPA, Region IX, 215 Fremont Street, San Francisco, California 94103.

- Air Programs Branch, EPA, Region X, 1200 6th Avenue, Seattle, Washington 98101.

FOR FURTHER INFORMATION CONTACT: Kenneth Woodard, Standards Implementation Branch (MD-15), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711. Telephone: (919) 541-3351 (FTS 629-5351).

SUPPLEMENTARY INFORMATION:

L. Background

On July 1, 1987 (52 FR 24672), EPA promulgated in 40 CFR Parts 51 and 52 policies and regulations by which it will implement the PM₁₀ NAAQS. The EPA's policies for developing SIP's for PM₁₀ are discussed fully in section IV.C. of the preamble to that Federal Register (52 FR 24672). Also as noted in that preamble, section 110(a)(1) of the Clean Air Act (Act) requires that each State adopt and submit within 9 months after revision of a NAAQS, a SIP providing for attainment and maintenance of the primary NAAQS as expeditiously as practicable but no later than 3 years from the date EPA approves the SIP.

Due to a lack of PM₁₀ ambient monitoring data, EPA considered different ways of implementing this requirement, including simply calling upon States to develop and submit a full PM₁₀ attainment demonstration and control strategy for every area of the country within the 9-month period. The EPA believes, however, that such a requirement would be unreasonable in many areas. An analysis of ambient total suspended particulate (TSP) data for 1984-1986 in conjunction with the methodology described in EPA's "probability guideline" (Procedures for Estimating Probability of Nonattainment of a PM₁₀ NAAQS Using Total

Suspended Particulate Matter or PM₁₀ Data. EPA 450/4-86-017) indicates that there could be from 50 to 150 counties in which the PM₁₀ NAAQS will not be attained. While these numbers are the best indication at this time of the potential nonattainment situation for PM₁₀, they are only estimates and will probably change as new ambient PM₁₀ data become available. The estimates are, however, useful as an indication of the degree of PM₁₀ SIP development that may eventually be necessary. The key point is that many of the 3141 counties in the Nation may need no additional particulate matter SIP provisions to meet the revised NAAQS. That for many areas, the existing TSP SIP's may already provide for timely attainment and maintenance of the PM₁₀ NAAQS. To call upon areas that almost certainly have adequate SIP's to resubmit those SIP's along with full attainment demonstrations would be unnecessary and therefore wasteful of limited State resources.¹

There are, also, several areas where available data indicate that air quality may be close to the level of the NAAQS. Many of these areas may actually be shown with more ambient data, to be in attainment or may need only minor SIP changes. Therefore, EPA believes that demand for immediate submissions of attainment demonstrations and control strategies for all of these areas is unreasonable when additional PM₁₀ air quality data could provide a more clear picture of the status of the area. On the other hand, due to applicable Act requirements and the potential environmental risk, the Administrator did not consider it reasonable to permit delay in the development of PM₁₀ control programs for areas with severe air quality problems until adequate PM₁₀ data were available to show that the area was violating the PM₁₀ NAAQS.

For the reasons given immediately above, EPA adopted a policy by which it is dividing all areas of the country into three categories: (1) Areas with a strong likelihood of violating the PM₁₀ NAAQS and requiring substantial SIP adjustments (Group I), (2) areas where attainment of the standards is possible and existing SIP's probably need less adjustment (Group II), and (3) areas with a strong likelihood of attaining the PM₁₀ NAAQS and therefore needing only adjustments

¹ Developing a sound attainment demonstration is generally resource intensive. It requires an in-depth study of the emission characteristics of specific sources in the demonstration area and a thorough evaluation of the anticipated effects of various emission levels from these sources. The EPA estimates it could require up to 4 weeks years and \$250,000 to develop a SIP for each area found to be violating the NAAQS.

to the applicable prevention of significant deterioration/new source review (PSD/NSR) and monitoring provisions in their SIP's (Group III).

The EPA used a three-step process to categorize areas into Groups I, II, and III. First, where only ambient TSP data or limited amounts of PM₁₀ data were available, EPA in cooperation with State agencies used those data and the probability guideline to classify areas preliminarily as Group I, II, or III. The EPA presumed that, at a minimum, the (1) areas with a probability of not attaining the PM₁₀ standard of at least 95 percent fit into Group I; (2) areas with a probability of between 20 and 95 percent fit into Group II; and (3) areas with a probability of less than 20 percent fit into Group III.

Second, EPA's Regional Offices, after consulting with the appropriate State and local agencies, evaluated the existing TSP SIP's, available existing source data, and other relevant information for each area in their jurisdiction (2) to see whether information other than the probability of nonattainment justified changing the group for an area, and (2) to determine the appropriate group for areas that the EPA could not classify under the first step because ambient TSP data were unavailable.

Third, to insure national consistency, all grouping was reviewed by representatives of EPA's Headquarters staff and Regional Offices.

The EPA has completed the process of categorizing areas and the Group I and II areas are listed by State in the following section of this notice. Any area of a State not listed as Group I or II is considered to be in Group III.

The requirements and schedules for developing PM₁₀ SIP's are different for Group I, II, and III areas. Immediate action to develop a full SIP that will bring about attainment and maintenance of the PM₁₀ NAAQS is required for Group I areas because they have a strong likelihood of violating the NAAQS and requiring substantial revision of the existing SIP. Since the attainment status of Group II areas is uncertain, time is allowed for additional monitoring of ambient PM₁₀ concentrations before revision of the existing control strategy is required. Group III areas have a strong likelihood of attaining the PM₁₀ NAAQS. Therefore, for Group III areas, the State need only submit SIP revisions for the preconstruction review program and monitoring network (52 FR 24681) within 9 months. The requirements for SIP development for each group are discussed fully at 52 FR 24680-24682.

The Group I and II areas of concern are generally described below a county, a township, or a planning area. These descriptions are only the definitions of the areas that were investigated in the SIP development process. In the process of monitoring and modeling PM₁₀ concentrations determining the extent of source PM₁₀ emissions that impact the States will better define the boundaries of the area that is or violating the standards.

In 1977, Congress added section 107(d)(1) to the Act which requires to designate areas as nonattainment, unclassifiable, or attainment for NAAQS existing at that time. In Part 81, EPA made such designations TSP. Since the PM₁₀ NAAQS is implemented under the provisions of section 110 of the Act, such designations are not necessary for PM₁₀. Thus will not make such designations PM₁₀ (see 52 FR 24682). However, will retain the TSP designations to implement the requirements of F the Act relating to PSD (see 52 FR 24683).

II. List of Areas

Separate lists of Group I and II areas follow. They are listed by within each State. The area of concern or planning area within the court specified where appropriate.

GROUP I AREAS

State and County	Area of Concern
Alaska:	
Anchorage	Anchorage
Juneau	Juneau
Arizona:	
Cochise	Paul Sauer/Douglas area,
Pinal	Hayden/Mt. Lemmon area and Phoenix area
Gila	Hayden/Mt. Lemmon area
Mohave	Phoenix planning area
Yuma	Yuma planning area
Pima	Phoenix planning area
California:	
Inyo	China Valley planning area, Valley planning area
Mono	Mountain Lakes planning area
Fresno	San Joaquin Valley
Kern	San Joaquin Valley and Seaside area
Kings	San Joaquin Valley
Tulare	San Joaquin Valley
Los Angeles	LA metropolitan area
Colorado:	
Orange	LA metropolitan area
Riverton	Seven Coast Air Basin and Valley
San Bernardino	Seven Coast Air Basin and San Bernardino area
Imperial	Imperial Valley planning area Planning area
Colorado:	
Arapahoe	Peppe Springs
Adams	Denver metropolitan area
Denver	Denver metropolitan area
Arapahoe	Denver metropolitan area
Jefferson	Denver metropolitan area
San Miguel	Telluride
Prowers	Larimer
Pitkin	Aspen

GROUP I AREAS—Continued

State and county	Area of concern
Fremont	Canyon City.
Connecticut	
New Haven	Interstate 95 corridor.
Fairfield	Interstate 95 corridor.
Iowa	
Ade	Bonne.
Shoshone	Promont.
Bonne	Sandpoint.
Bannock	Pocatello.
Power	Pocatello.
Idaho	
Madison	County.
Cook	County.
Indiana	
Lake	County.
Potter	County.
Maree	
Archibald	Presque Isle.
McGregor	
Wayne	County.
Monroe	
Ramsey	County.
Montezuma	
Flethead	Kalispell.
Lincoln	Lolo.
Lake	Ronan, Polson.
Missoula	Missoula.
Roosel	Lower Deer.
Silver Bow	Butte.
Nez Perce	Rain shadow area.
Wallowa	Las Vegas planning area.
Clark	
New Mexico	
Otero	County.
Custer	County.
Jefferson	County.
Oregon	
Jackson	Medford and White City.
Jessehina	Grants Pass.
Lane	Eugene and Springfield.
Malheur	Klamath Falls.
Umatilla	
Umatilla	County.
Utah	
Salt Lake	Salt Lake metropolitan area and Magna.
Utah	Provo.
West Virginia	
Breck	Followence area.
Washington	
King	Seattle metropolitan area.
Pierce	Tacoma metropolitan area.
Seatac	Seattle.
Yakima	Yakima.
Thurston	Lacey.
Wasco Wasco	Wasco.
Wyoming	
Shoshone	Sheridan.

GROUP II AREAS—Continued

State and county	Area of concern
Gardiner	Glenwood Springs, Park.
Garfield	Crested Butte.
Gunison	Steamboat Springs.
Grand	Grand Junction, Fruita.
Meade	Greely.
Weld	Greeley.
Garfield Pit	County.
Idaho	Cassia.
Miner	Miner.
Latah	Diebly.
Randolph	Bonne.
Madison	Douglas.
Roseburg	Rock Island, Maine.
Will	Jean.
St. Clair	East St. Louis.
Dufour	Adams.
Lincoln	Suburb of Indianapolis.
Menom	Twin Falls.
Vigo	Vigo.
West	
Cave Creek	Marin City.
Linn	Ceder Rapids.
Pott	Dixie Narrows.
Kansas	Kansas City.
Wyandotte	Cassadaga and Attica.
Kentucky	Boyle.
Boyd	Montgomery.
Marion	Benton.
Barren	Bell.
McMinn	Benton.
Magoffin	Sophia.
Sophia	Corbin.
Marion	Marion.
Montgomery	Montgomery.
Harrison	Duluth and Iron Range.
St. Louis	Iron Range.
Clinton	Lake.
Lake	Twin Ports area.
Stevens	St. Cloud area.
Montana	Missoula.
Blaine	Missoula.
Flathead	Colville Falls.
Deer Lodge	Anaconda.
Lewis &	Helena.
Clark	Thompson Falls.
Sanders	Smoky.
Nez Perce	Weingard Water.
Clearwater	Challis.
Nez Perce	Salmo mountain area.
Latah	Salmo Mountain area.
Humboldt	Salmo Mountain area.
Elo	Salmo Mountain area.
Elmore	Salmo Mountain area.
New Jersey	
Hudson	Jersey City.
Cameron	Cameron.
New York	Salem.
Oneida	
Jefferson	County.
Madison	County.
Jefferson	County.
Grant	County.
Santa Fe	County.
Sandoval	County.
Taos	County.
Ore	
Wheeler	Canyon.
Sumner	New Berlin.
Washington	Wenatchee, Hanford area.
Lassen	Shasta area.
Sutter	Modesto.
Sacramento	Thompson area.
San Joaquin	Johnson area.
Marin	Marysville Ferry.
Contra Costa	East Livermore.
Alameda	Isleton.
Franklin	Concord.
Marin	Concord.
Marinette	Youngstown.
Montgomery	Dayton.
Richland	Kennewick.
Stark	South.
Sumner	Aber.
Clallam	County.
Clallam	Comox.
Clallam	Comox.
Oregon	Oregon.
Deschutes	Sumas.
Wasco	Portland.
Marietta	Umatilla.
Union	La Grande.
Lane	Oregone.
Perry	
El Paso	Colorado Springs.
Allegany	County.

GROUP II AREAS—Continued

State and county	Area of concern
Philadelphia	Braddock—Port Richmond.
Erie	County.
Lawrence	County.
Monroe	County.
Puerto Rico:	San Juan.
San Juan	County.
South Dakota	Rapid City.
Wyoming	Arvada.
Teton	County.
Deleware	Delaware.
Morris	County.
Lancaster	County.
Warren	County.
Monroe	County.
Wayne	County.
Washington	County.
Wyoming	Wyoming.
Wyoming	Wyoming.

Authority: Sections 110 and 301 of the Act give the Administrator authority to adopt policies necessary to implement NAAQS.

Date: August 3, 1987.

Craig Petrie,

Assistant Administrator for Air and Radiation.

[FR Doc. 87-17880 Filed 8-6-87; 2:45 am]

ENTERING CODE 8888-08-14

40 CFR Parts 51 and 52

[AD-PRL-3244-3]

Regulations for Implementing Revised Particulate Matter Standards; Correction

Agency: Environmental Protection Agency (EPA).

Action: Final rule; correction.

SUMMARY: The EPA is correcting errors in the regulations for implementing the revised particulate matter standards which appeared in the Federal Register on July 1, 1987 (52 FR 24872).

FOR FURTHER INFORMATION CONTACT: Mr. Daniel deRoock at (919) 541-5503 (FTS 629-5503).

SUPPLEMENTARY INFORMATION: The EPA has promulgated revisions to its regulations for the review of new and modified sources and the prevention of significant deterioration of air quality. These revisions address the fact that EPA has revised its national ambient air quality standards for particulate matter. The revised regulations contained errors

CLEAN AIR ACT AMENDMENTS OF 1990

AIR TOXICS

Under current law only seven air toxic pollutants are regulated.¹ The Clean Air Act of 1990 establishes a new, more extensive program for regulating routine toxic emissions from two principal sources - (1) major stationary sources which are defined as those sources that emit or have the potential to emit (considering controls) ten tons per year of any toxic pollutant or 25 tons per year of any combination of toxic pollutants,² and (2) "area sources," which are stationary sources that are not regulated as a major source, but which still pose a significant health risk. In addition, the Act creates a new program designed to prevent sudden, accidental releases of extremely hazardous substances.

Generally, the Act sets forth a list of toxic air pollutants to be regulated in two phases. In the first phase, sources are required to install control technology to meet technology-based standards. If, after these standards have been met, remaining emissions still pose a threat to exposed individuals, then a second phase of health-based controls must be met.

A List

The Act establishes a statutory list of 189 toxic air pollutants to be regulated. See Attachment #1. The list includes methyl chloroform (1:1:1 trichloroethane), toluene, xylenes, benzene, glycol ethers, chromium compounds, nickel compounds, cadmium,

¹EPA has established emission standards for vinyl chloride, beryllium, benzene, asbestos, arsenic, mercury and radionuclides.

²Although EPA is currently working on the definition of source with regard to future air toxics regulations, EPA personnel have indicated that EPA will probably total all emissions from multiple individual sources at a single facility to determine whether the regulations are triggered.

compounds and lead compounds. EPA should soon publish a final rule establishing a petition process that allows industry the opportunity to delist a particular compound or pollutant that does not pose an adverse risk to human health or the environment.

B. List of Regulated Stationary Sources

EPA is currently working on a draft list of regulated major source categories and subcategories and a staggered schedule for establishing regulations for those listed categories. Attached is a preliminary draft of the listed categories targeted for regulation in November of 1992, 1994, and 1997. (See Attachment #2) Most steel manufacturing operations (as well as related metal reclamation processes) are scheduled for final regulation by November 1997. EPA is currently working on a petition process that will allow industry the opportunity to delist a particular source category that does not pose a significant risk to human health or the "environment.

C Technology-Based Emission Standards

For each listed industrial category, EPA is to promulgate a standard which requires each source in the category to install the maximum achievable control technology ("MACT"). MACT is generally the best available control technology, taking costs into account. For existing sources in a category or subcategory with more than 30 sources, MACT must be at least as stringent as the best performing 12 percent of existing sources in the same category (excluding sources which have recently complied or would comply with LAER). For sources in a category or subcategory with less than 30 sources, MACT would be based on the best performing 5 sources. New "major sources" must achieve the most stringent emission levels achieved in practice by the best controlled similar source. EPA may elect to promulgate alternative standards for "area sources" that provide for

the use of generally available control technologies or management practices in lieu of MACT.

Existing sources are required to be in compliance with the standards as expeditiously as practicable, but not later than three years after promulgation of the standards. The permitting authority may grant an additional one year extension if such an extension is necessary to install controls. Any source which voluntarily reduces emissions of a listed substance by 90 percent (95 percent for particulates) from emission levels in a base year not earlier than calendar year 1987³ may be subject to alternative limits in lieu of MACT controls for up to six years after the MACT compliance date.

D. **Health-Based Standards**

By May 15, 1993, National Academy of Science must conduct and submit= study which reviews EPA's risk assessment methodology. By November 15, 1996, EPA must report to Congress and recommend legislation to address the public health risk remaining from sources subject to technology-based standards. If Congress does not act on EPA's recommendation, EPA is required to issue stricter health-based standards eight years after the initial promulgation of the MACT standards, if stricter standards are necessary to provide "an ample margin of safety to protect the public health" and the environment. Sources which emit toxic pollutants which may pose a cancer risk of greater than one-in 1,000,000 to the person in the general population most exposed to the source will be required to comply with stricter control standards. EPA must establish health-based

³This reduction may be measured from emissions data reported on the calendar year 1987 Form Rs submitted pursuant to section 313 of the Emergency Planning and Community Right-to-Know Act of 1986 (also known as Title III of the Superfund Amendments and Reauthorization Act ("SARA")).

standards on the risks posed by the actual pollutant emitted (i.e., trivalent chromium) and not on the basis of more toxic or carcinogenic compounds in the same general category (i.e., hexavalent chromium).

E. Construction, Reconstruction and Modification

After the effective date of any emission standard or regulation, no person may construct any new major source or reconstruct any existing major source subject to such standard unless EPA or the state permitting authority determines that the new source will comply with the applicable standard. After a state has implemented an EPA-approved air toxics permit program, no person may construct any new major source in that state or reconstruct any existing major source in that state unless the permitting authority determines that the constructed or reconstructed source will comply with the applicable MACT standards for new sources. Such determination will be made on a case-by-case basis where no applicable emission limitations have been established.

No person may modify a source of toxic air pollutants unless the permitting authority determines that the applicable MACT standard for existing sources will be met. Such determination will be made on a case-by-case basis where no applicable emission limitations have been established. A physical change of a major source which results in a greater than de minimis increase in actual emissions of a hazardous air pollutant shall not be considered a “modification” if such increase is offset by an equal or greater decrease in the amount of emissions of other more hazardous pollutants.

F. Sudden, Accidental Releases

The bill also establishes a program to prevent or provide effective responses to sudden, accidental release of extremely hazardous substances. The bill requires EPA to publish an initial list of at least 100 substances which may, as a result of sudden events,

be released in concentrations that may reasonably be anticipated to cause death or illness in humans. This list is to be based on the list of extremely hazardous substances under the Emergency Planning and Community Right to Know Act of 1986.⁴

On or before November 15, 1993, EPA must promulgate regulations for the prevention and detection of accidental releases of regulated substances and for emergency responses to such releases by regulated sources. These regulations will require owners and operators of each regulated source processing, handling or storing listed substances in amounts in excess of the threshold amounts set by EPA to: (1) to prepare a hazard assessment for their facilities to determine the likely consequences of an accidental release of the substance; (2) design and implement a program to prevent releases, and (3) design a response program to minimize the consequences of sudden, accidental releases which do occur.

The owner or operator of any facility handling an extremely hazardous substance will also be required to prepare and implement a risk management plan to detect and prevent or minimize the potential for an accidental release of extremely hazardous substances. EPA may require that such plans be reviewed by an independent engineer and that deficiencies be identified and corrected. These plans must be submitted to EPA the Chemical Safety and Hazardous Investigation Board, and the appropriate state and local agencies.

⁴The initial list must include chlorine, anhydrous ammonia, methyl chloride, ethylene oxide, vinyl chloride, methyl isocyanate, hydrogen cyanide, ammonia, hydrogen sulfide, toluene disocyanate, phosgene, bromine, anhydrous hydrogen chloride, hydrogen fluoride, anhydrous sulfur dioxide, and sulfur trioxide.

(b) List of Pollutants --

(1) Initial List.-- The Congress establishes for purposes of this section a list of hazardous air pollutants as follows:

CAS mmber	Chemical name
73070	Acetaldehyde
60355	Acetamide
75058	Acetonitrile
93862	Acetophenone
53963	2-Acetylaminofluorene
107028	Aerolein
79061	Acrylamide
79107	Acrylic acid
107131	Acrylonitrile
107051	Allyl chloride
92671	4-Aminobiphenyl
62598	Aniline
90040	o-Anisidine
1332214	Asbestos

CAS number	Chemical name
71432	Benzene (including benzene from gasoline)
92875	Benzidine
98077	Benzotrichloride
100447	Benzyl chloride
92524	Biphenyl
117817	Bis(2-ethylhexyl)phthalate (DEHP)
542881	Bischloromethylether
73252	Bromoform
106990	1,3-Butadiene
156827	Calcium cyanamide
105602	Caprolactam
133062	Capron
63252	Carbaryl
73150	Carbos disulfide
56235	Carbos tetrachloride
463581	Carboethyl sulfide
120809	Catechol
133904	Chloramben
57749	Chlordane
7782505	Chlorine
79118	Chloroacetic acid
532274	2-Chloroacetophenone
108907	Chlorobenzene
310156	Chlorobenzilate
67663	Chloroform
107302	Chloromethyl methyl ether
126998	Chloroprene
1319773	Cresols/Cresylic acid (isomers and mixture)
95487	o-Cresol
108394	m-Cresol
106443	p-Cresol
98828	Cumene
94757	2,4-D. salts and esters
3547044	DDE
334883	Diazomethane
132649	Dibenzofurans
98128	1,2-Dibromo-3-chloropropane
84742	Diksyiphtalate
106487	1,4-Dichlorobenzene(p)
91941	3,3-Dichlorobenzidine
111444	Dichloroethyl ether (Bis(2-chloroethyl)ether)
542756	1,3-Dichloropropene
62737	Dichlorvos
111422	Diethanolamine
121697	N,N-Diethyl aniline (N,N-Dimethylaniline)
64675	Diethyl sulfate
119904	3,3-Dimethoxybenzidine
60117	Dimethyl aminoazobenzene
119937	3,3'-Dimethyl benzidine
79447	Dimethyl carbamoyl chloride
68122	Dimethyl formamide
57147	1,1-Dimethyl hydrazine

CAS number	Chemical name
131113	Dimethyl phthalate
77781	Dimethyl sulfate
534521	4,6-Dinitro-o-cresol and salts
51285	2,4-Dinitrophenol
121142	2,4-Dinitrotoluene
123911	1,4-Dioxane (1,4-Diethylenecoxide)
122687	1,2-Diphenylhydrazine
106898	Epichlorohydrin • 1-Chloro-2,3-epoxypropane)
106887	1,2-Epoxybutane
140885	Ethyl acrylate
100414	Ethyl benzene
51798	Ethyl carbamate (Urethane)
73003	Ethyl chloride (Chloroethane)
106934	Ethylene dibromide (Dibromoethane)
107062	Ethylene dichloride (1,2-Dichloroethane)
107211	Ethylene glycol
151564	Ethylene imine • Aziridine)
73218	Ethylene oxide
96457	Ethylene thiourea
73343	Ethyldene dichloride (1,1-Dichloroethane)
50000	Formaldehyde
76448	Heptachlor
118741	Hexachlorobenzene
87683	Hexachlorobutadiene
77474	Hexachlorocyclopentadiene
67721	Hexachloroethane
822060	Hexamethylene-1,6-diisocyanate
680319	Hexamethylphosphoramide
110543	Hexane
302012	Hydrazine
7847010	Hydrochloric acid
7664398	Hydrogen fluoride (Hydrofluoric acid)
123319	Hydroquinone
78591	Isophorone
58899	Lindane (all isomers)
106316	Maleic anhydride
67561	Methanol
72435	Methoxychlor
74639	Methyl bromide (Bromomethane)
74673	Methyl chloride (Chloromethane)
71556	Methyl chloroform (1,1,1-Trichloroethane)
78933	Methyl ethyl ketone (2-Butanone)
60344	Methyl hydrazine
74884	Methyl iodide (Iodomethane)
106101	Methyl isobutyl ketone (Hexane)
624839	Methyl isocyanate
80626	Methyl methacrylate
1634044	Methyl tert-butyl ether
101144	4,4-Methylene bis(2-chloroaniline)
75092	Methylene chloride (Dichloromethane)
101688	Methylene diphenyl diisocyanate (MDI)

CAS number	Chemical name
101779	4,4'-Methylenedianiline
91203	Naphthalene
98953	Nitrobenzene
92933	4-Nitrobiphenyl
100027	4-Nitrophenol
79469	2-Nitropropane
684935	N-Nitroso-N-methylurea
62759	N-Nitrosodimethylamine
59892	N-Nitrosomorpholine
56382	Parathion
82688	Pentachloronitrobenzene (Quintobenzeno)
87865	Pentachlorophenol
108952	Phenol
106503	p-Phenylenediamine
75445	Phosgene
7803513	Phosphine
7723140	Phosphorus
85449	Phthalic anhydride
1336363	Polychlorinated biphenyls (Aroclors)
1120714	1,3-Propane sultone
57578	beta-Propiolactone
123386	Propionaldehyde
114261	Propozur (Baygon)
78875	Propylene dichloride (1,2-Dichloropropane)
75569	Propylene oxide
75558	1,2-Propylenimine (2-Methyl aminine)
91225	Quinoline
108514	Quinone
100425	Styrene
96093	Styrene oxide
1746016	2,3,7,8-Tetrachlorodibenzo-p-dioxin
79345	1,1,2,2-Tetrachloroethane
127184	Tetrachloroethylene (Perchloroethylene)
7550450	Titanium tetrachloride
108883	Toluene
95807	2,4-Toluene diamine
584849	2,4-Toluene diisocyanate
95534	e-Toluidine
8001352	Tozaphene (chlorinated camphene)
120631	1,2,4-Trichlorobenzene
79006	1,1,2-Trichloroethane
79016	Trichloroethylene
95954	2,4,5-Trichlorophenol
88063	2,4,6-Trichlorophenol
121448	Triethylamine
1582098	Trifluralin
540841	2,2,4-Trimethylpentane
108054	Vinyl acetate
593802	Vinyl bromide
75014	Vinyl chloride
75354	Vinylidene chloride (1,1-Dichloroethylene)
1330207	Xylenes (isomers and mixture)

CAS number	Chemical name
95476	<i>o-Xylenes</i>
108383	<i>m-Xylenes</i>
106-123	<i>p-Xylenes</i>
0	Antimony Compounds
0	Arsenic Compounds (inorganic including arsine)
0	Beryllium Compounds
0	Cadmium Compounds
0	Chromium Compounds
0	Cobalt Compounds
0	Coke Oven Emissions
0	Cyanide Compounds ¹
0	Glycid ethers ²
0	Lead Compounds
0	Manganese Compounds
0	Mercury Compounds
0	Fine mineral fibers ³
0	Nickel Compounds
0	Polymeric Organic Matter ⁴
0	Radiomculides (including radon) ⁵
0	Selenium Compounds

NOTE: For all entries above which contain the word "compounds" and for glycid ethers, the following applies: Unless otherwise specified, these listings are defined as including any unique chemical substance that contains the named chemical (i.e., aromatic, aromatic, etc.) as part of that chemical's refractive structure.

¹ ICN where X = R' or any other group where a formal dissociation may occur. For example KCN or Cs(CN)2

² includes mono- and di- ethers of ethylene glycol, diethylene glycol, and triethylene glycol R-(OCH₂CH₂)_n-OR'

n = 1, 2, or 3

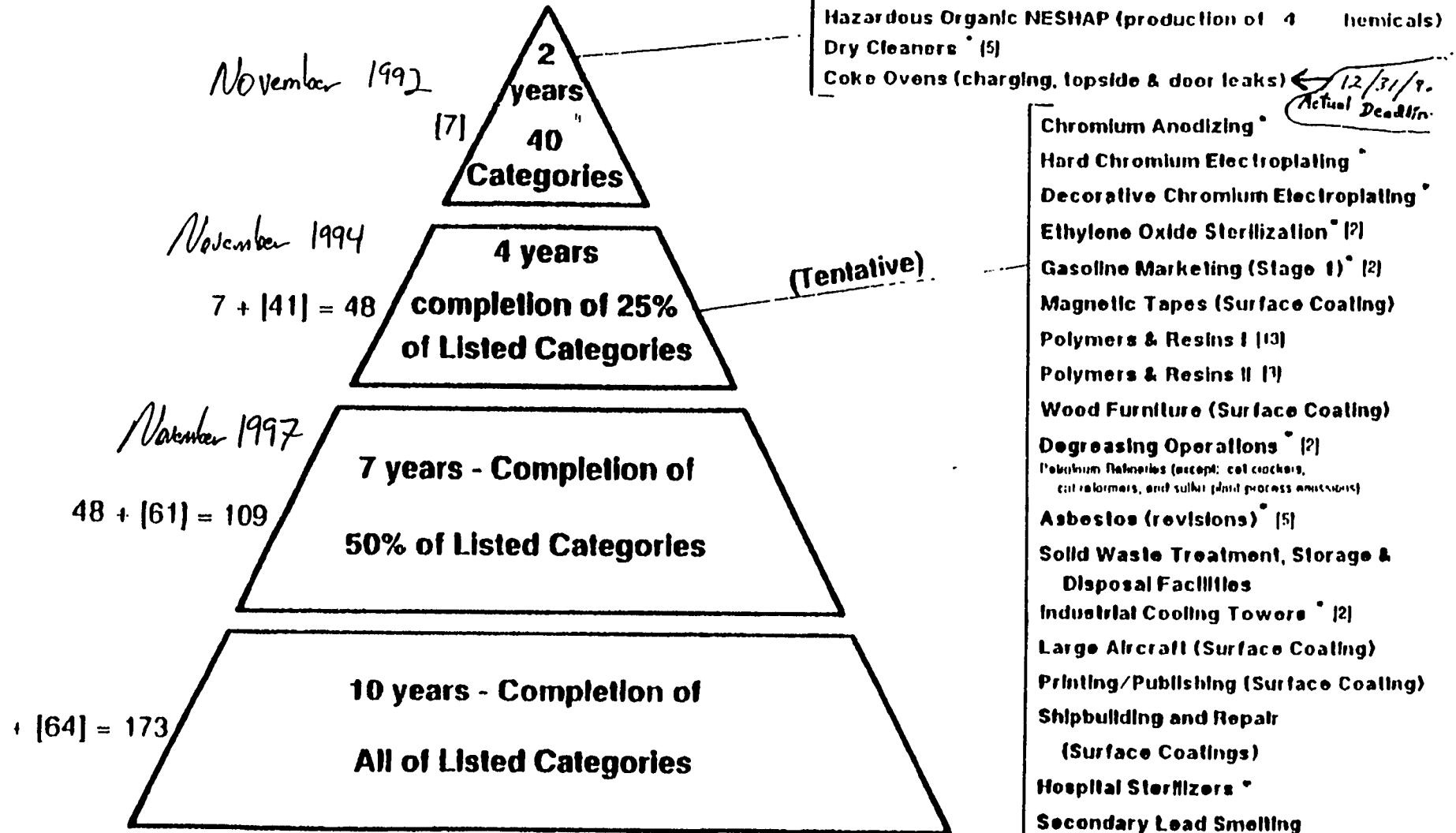
R = alkyl or aryl groups

R' = R, Z, or groups which, when removed, yield glycid ethers with the structure R-(OCH₂CH₂)_n-OR'. Polyesters are excluded from the glycid category.

³ includes mineral fiber emissions from facilities manufacturing or processing glass, rock, or slag fibers (or other mineral fibers) of average diameter 1 micrometer or less.

⁴ includes organic compounds with more than one benzene ring, and which have a boiling point greater than or equal to 100°C.

⁵ a type of atom which spontaneously undergoes radioactive decay.



* Includes area sources

DRAFT BIN ASSIGNMENTS FOR THE EMISSIONS STANDARDS DEVELOPMENT SCHEDULE

PRELIMINARY/DRAFT

7 - Y E A R D R A F T B I N
A S S I G N M E N T S

1/20, 15, 1997

ACETAL RESINS PRODUCTION

ACRYLIC FIBERS/MODACRYLIC FIBERS PRODUCTION

AEROSOLS PRODUCTION

ASPHALT CONCRETE MANUFACTURING

ASPMALT PROCESSING

AUTO AND LIGHT DUTY TRUCK (SURFACE COATING)

BENZYL TRIMETHYLLAMMONIUM CHLORIDE PRODUCTION

CADMUM REFINING

CARBOXYMETHYLCELLULOSE PRODUCTION

CELLOPNAME PRODUCTION

CHELATINO AGENTS PRODUCTION

CHLORONEB Production

CHROMIUM REFACTOAIIES PRODUCTION

CLAY PRODUCTS MANUFACTURING

COKE OVENS (PUSHING, QUENCHING, BATTERY STACKS)

ENOINE TEST FACILITIES

FERROALOYS PRODUCTION

FLEXIBLE POLYURETHANE FOAM PRODUCTION

FORMALDEHYDE RESINS Production

HYDROCHLORIC ACID PRODUCTION

HYDROGEN FLUORIDE PRODUCTION

INTEGRATED IRON STEEL MANUFACTURING

INTERNAL COMBUSTION ENGINES

IRON FOUNDRIES

MINERAL PRODUCTION

MUNICIPAL LANDFILIS

NON-STAINLESS STEEL MANUFACTURING . EAF OPERATION

NYLON FIBERS PRODUCTION

NYLON PLASTICS PRODUCTION

OIL AND GAS Production

PAPER AND OTHER Was(SURFACE COATING)

PHARMACEUTICALS PRODUCTION

PHENOUC RESINS PRODUCTION

PHOSPHATE FERTILIZERS PRODUCTION

PHOTOGRAPHIC CHEMICALS PRODUCTION

POLESTER RESINS PRODUCTION

POLYETHER POLYOLS PRODUCTION

POLYMETHYL METHACAYLATE RESINS PRODUCTION

POLY VAYL ACETATE PRODUCTION

POLYVINYL ALCOHOL PRODUCTION

POLYVINYL BUTYRAL PRODUCTION

PORTLAND CEMENT MANUFACTURING

PRIMARY COPPER SMELTING

PRIMARY LEAD SMELTING

PROCESS HEATERS

PULP & PAPER PRODUCTION

RAYON PRODUCTION

REINFORCED PLASTIC Composites PRODUCTION

RUBBER CHEMICALS PRODUCTION

R-11 (BUTADIENE - FURFURAL-COTRIMER)

PRODUCTION

SEMICONDUCTORS MANUFACTURING

SEWAGE SLUDGE INCINERATION

STAINLESS STEEL MANUFACTURING - EAF

OPERATION

STEEL FOUNDRIES

STEEL PICKLING PROCESS

TURBINES

WOOL FIBERGLASS MANUFACTURING

ZINC SMELTING

CLEAN AIR ACT AMENDMENTS OF 1990
PERMIT PROGRAM

The Act established a new federal clean air permit program. Although approximately 35 states already have permit programs, the federal program is likely to require modifications in those programs. The program is designed to be run by states and will (1) define precisely the requirements applicable to a source, (2) facilitate enforcement, and (3) generate revenues. The permits are likely to impose more comprehensive and detailed requirements on sources than in the past.

EPA is currently working to finalize regulations establishing the minimum requirements of the new state run permit program. These regulations were required by law to be issued on November 15, 1991. For the last six months, however, the White House and EPA have been negotiating the degree of public participation that is required before States and EPA will approve of permit modifications. The White House and the Office of Management and Budget ("OMB") are concerned that excessive delay will occur if industry is unable to modify permitted production operations without first going through EPA's proposed public notice and comment period. EPA has strongly indicated that public notice and comment is statutorily required for most permit modifications and essential for the Act's success. Attachment # 1 to this document is a memorandum that summarizes EPA's permit rule as it was proposed last May. Although specific provisions will be different in the final permit rule, we expect that the final rule will incorporate the basic structure of the proposed permit rule.

Regardless of when the permit rule is promulgated, the statute provides that on or before November 15, 1993, the Governor of each state must develop and submit a proposed permit program that meets minimum requirements of the final federal program.

Within one year of receiving a proposed state permit program (presumably by November 15, 1994), EPA must approve or disapprove such program in whole or in part. If an entire state program has not been approved by November 15, 1995, EPA shall promulgate and administer a program for that state;

All owners and operators of major stationary sources must operate the source in compliance with a permit issued by the state permitting authority. A permit fee of at least \$25 per ton of emissions of regulated pollutants must be imposed to cover all direct and indirect costs required to develop and administer the permit program. The permitting authority must have the authority to recover civil penalties of at least \$10,000 per day for each violation. The term of the permit is not to exceed five years. Permits for major sources with a remaining term of three or more years must ordinarily be revised to incorporate standards and regulations promulgated after issuance of the permit. A single permit may be issued for a facility with multiple sources.

Any person required to have a permit must apply for the permit not later than 12 months after becoming subject to the permit program. The permitting authority is required to approve or deny the application within 18 months after the date of receipt (except a 3-year phased review is allowed for applications submitted within the first year of the permit program). If an applicant has submitted a timely and complete application for a permit, but final action on the application has not been taken by the state, the applicant's failure to have a permit is not to be considered a violation.

Each permit issued is required to set forth enforceable emission limitations and standards, as well as any inspection, entry, monitoring compliance certification, and reporting requirements. A responsible corporate officer must certify the accuracy of all reports that must be submitted. The permit must allow a permitted source to make

changes in operations without obtaining a permit revision as long as: (i) the changes are not modifications under Title I of the Act; (ii) the changes will not result in emissions that exceed emissions allowed in the permit; and (iii) the facility provides EPA and the permitting authority with written notice seven days in advance of the changes. States that are within 50 miles of the permitted source or contiguous states whose air quality may be affected may submit written recommendations on the proposed permit to the state permitting authority and to EPA. EPA has 45 days after receiving a copy of the proposed permit to object to the issuance of a permit. Upon receipt of an EPA objection, the permitting authority may not issue the permit unless it is revised to meet EPA's objections. If EPA does not object, any person may petition EPA to do so. Compliance with a permit is deemed compliance with other applicable provisions of the Clean Air Act if the permit expressly includes those provisions or if the permitting authority includes in the permit a specific determination that such provisions are not applicable.

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Attachment 1

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MEMORANDUM

July 10, 1991

FROM JOHN L WTITENBORN
WILLIAM M. GUERRY, JR

RE PROPOSED PERMIT REGULATIONS IMPLEMENT NEW.CLEAN
AIR ACT

On May 10, 1991, the U. S. Environmental Protection Agency ("EPA" or "the Agency") proposed regulations establishing a permit program for stationary sources of air pollution pursuant to Title V of the Clean Air Act Amendments of 1990. 56 Fed. Reg. 21712. The Title V permit program requires each major source and certain non-major sources of regulated pollutants at an estimated 34,000 industrial facilities to apply for and obtain a comprehensive air emission permit that contains all applicable operating and maintenance requirements and emission standards. Individual permits will typically be issued by States operating EPA approved permit programs. The proposed rule establishes minimum criteria that States will have to include in their air permit programs in order to obtain EPA approval. This memorandum analyzes the various aspects of the proposed permit program

STATUTORY BACKGROUND

Pursuant to the Clean Air Act Amendments of 1990, on or before November 15, 1991, EPA must publish final regulations establishing the minimum requirements of air permit programs to be administered by States. Subsequently, on or before November 15, 1993, the Governor of each State must develop and submit a proposed permit program that meets these minimum requirements. Within one year of receiving a proposed State permit program (presumably by November 15, 1994), EPA must approve or disapprove such a program in whole or in part. If an entire State program has not been approved by November 15, 1995, EPA shall promulgate and administer a program for that State.

Within 12 months of becoming subject to an authorized and effective permit program, regulated sources will have to submit a permit application. States must issue permits on a phased three year schedule for those permit applications that are submitted in the first year a program is effective. After the initial round of permits is in place, States are required to approve or deny new or revised permit applications within 18 months after the date of receipt. Each issued permit is required to set forth all enforceable emission limitations and standards as well as any inspection, entry, monitoring, compliance certification and reporting requirements. A single permit may be issued for a facility with multiple sources of emissions. The term of a permit will not exceed five years.

SUMMARY OF PROPOSED RULE

The proposed broad definition of "major sources" that are subject to the proposed operating permit rule incorporates numerous definitions of "source" set forth in the Act,

and thus affects a large number of industries and sources. If the permittee demonstrates compliance with all the terms of his permit, he is "shielded" from a challenge that he has violated any of the requirements of the Clean Air Act that are expressly included in his permit. However, the permit shield principle is subject to certain holes or exemptions. For example, the permittee bears the burden of determining which requirements of the Act are applicable and disclosing these in the application. There is no shield for applicable provisions that were mistakenly omitted from a permit. The proposed regulations only allow for operational flexibility to the extent that a process change does not result in emissions that violate the permit's conditions or constitute a "modification." Finally, industry will bear the cost of the proposed permit program through user fees based on the tons of regulated pollutants they emit.

ANALYSIS

A **Sources Subject to Permits**

Several classes of sources are subject to the permitting requirements set forth in the proposed regulations. In addition to all major sources certain non-major sources are also subject to these permitting requirements. However, EPA is proposing to defer for five years the applicability of the permit program to non-major sources. Even with the proposed deferral, the scope of the program still is monumental.

1. **Definition of Major Sources**

The proposed regulations define a "major source" as either a single stationary source or a group of sources that: (i) are located on contiguous or adjacent properties under common control; (ii) belong to a single industrial grouping (i.e., have

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the same two digit Standard Industrial Classification Code; and (iii) meet the definition of a "major source" as defined in any other section of the Act. This includes "major sources" that "emit or have the potential to emit": (a) more than 10 tons per year ("TPY") of any listed hazardous air pollutant (eg., chromium, nickel, lead, manganese or cadmium compounds or 1:1:1 trichloroethane, trichloroethylene, or tetrachloroethylene) or 25 TPY of any combination of such listed air pollutants; (b) 100 TPY of any "air pollutant" as that term is defined within the general definitions set forth in section 3C of the Act;^{1/} or (c) sources that are defined as major sources in an area that has failed to attain the national ambient air quality standards for ozone, carbon monoxide or particulate matter.^{2/}

EPA interprets "potential to emit" in this part of the proposed regulation to mean the maximum capacity of a source to emit, taking into account any federal enforceable physical or operational limitations on that capacity, including air pollution control equipment. This means that a source which is able to reduce its emissions below the "major source" threshold by means of controls or enforceable operating limitations (and is not subject to any other provisions of the Act) maybe able to exempt itself from the permit program. EPA is proposing that such sources conduct adequate monitoring.

- 1/ Fugitive emissions are not included when determining whether a source is a major source under section 302 of the Act (General Definition), unless the source belongs to one of a listed category of sources. Iron and steel mills are one of the listed categories. See 56 Fed. Reg. at 21769.
- 2/ The definition of what constitutes a "major source" in an ozone nonattainment area depends on the classification of that area as marginal, moderate, serious, severe, or extreme. The greater the degree of nonattainment, "the smaller the major source threshold."

and submit monthly reports to the Agency to demonstrate that the major source threshold is not exceeded. 56 Fed. Reg at 21725.

2. **Application of Requirements to All Emission Units**

The proposed regulations would aggregate emissions from all units of the same industrial grouping in contiguous or adjacent properties to determine if the source is a major source. This may cause sources that would not otherwise need a permit to require one. A large industrial facility may have dozens or perhaps hundreds of individual units or air emission points which emit or have the potential to emit any regulated pollutant. Under the proposed permit program, all such emission points will have to be evaluated collectively to determine whether they constitute a major source. Once the permit program is found to be applicable to a source, all emissions units of the source must comply with the Act's requirements. There is no exception for de minimis emissions. If one emission unit triggers applicability of the permit program, all other emissions, regardless of magnitude or pertinence under the Act, become part of the permit. Once the permit program is found applicable to a source, all source emissions are used in the determination of fees chargeable to that source (Section D), a emissions monitoring data collection and data submittal requirements increase dramatically.

3. **Regulation of Non-Major Sources**

The proposed regulations will also apply to certain non-major sources including (i) any sources (including area sources) subject to a standard or regulation under section 111 (Standards of Performance for New Stationary Sources) or section 112 (Hazardous Air Pollutants) of the Act; (ii) any affected source subject to Title IV of the

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Act and the acid rain program requirements; and (iii) any source or source category designated by the Administrator of EPA. 56 Fed. Reg. at 21770. In order to spread out the administrative burden, EPA is proposing to defer the application of the permit requirements to non-major sources for the first five years a State's program is effective. The Administrator reserves the right to restrict this deferral and require certain non-major sources (*i.e.*, area sources) to obtain a permit that incorporates standards promulgated for hazardous air pollutants under section 112. EPA may also require a State to permit non-major volatile organic compounds ("VOC") and NO_x sources in nonattainment areas during the first five years that the State's program is effective if that State does not demonstrate it will achieve compliance without such permitting requirements.

B. Proposed Permit Shield Scope and Applicability

The proposed permit program contains provisions for a permit shield. A permittee is shielded from a challenge that he is not in compliance with any Clean Air Act provisions to the extent he can demonstrate compliance with the terms of an approved permit that properly includes all the Clean Air Act requirements that were applicable when the permit was issued. In order for the shield to be effective, the permit must first include all requirements of the Act. Sources bear the burden of producing all necessary information for a permit application, including emissions related data, and a determination of which Act requirements are applicable. The permit must state the requirements of the applicable sections and state that all other sections are not applicable. The permitting authority must make an express determination as to the non-applicable requirements and include that determination or a concise summary thereof in

the permit. Id at 21776. If these conditions are met, the shield provides protection against unclear provisions or changes in interpretation in these expressed requirements. Furthermore, the shield is extended to permits that are revised Id at 21744.

here are several ways by which EPA or a State can overcome the permit shield. First, the shield does not apply when the Administrator is using his emergency powers under section 303. Y Second, EPA is proposing that the shield not afford any protection from liability to a source that is not in compliance with a standard or regulatory requirement in effect at the time the operating permit is issued Id Third, any permit shield can be preempted if the permitting authority or EPA reopens the permit-for cause. Material mistakes in emissions limitations, standards or requirements will reopen a permit for cause and invalidate the permit shield. Additionally, a permit will be reopened for cause if EPA determines that the permit must be revised to assure compliance with the Act Id Permits which have three or more years remaining shall automatically be reopened to incorporate new standards and revisions promulgated after the issuance of such a permit. No automatic reopening takes place if the permit has less than three years left prior to renewal or if the effective date of the new requirement is later than the date the permit is due to expire.

The entire burden for creating a valid permit describing all applicable and nonapplicable requirements rests on the source. If the permit application is not filled out correctly and/or if insufficient data is provided, EPA may veto it. As proposed in

3/ **Under section 303, the Administrator may initiate civil suits or issue orders to restrain any person causing or contributing to the emissions of air pollutants that endanger public health or welfare, or the environment.**

the regulations, there are many ways for EPA and the State to circumvent the shield. The permit shield, therefore, is not as broad as its name might imply.

C. Operational Flexibility

As part of EPA's rulemaking process, industry was able to voice its concerns that the permit regulations might unduly constrain their operational flexibility. The proposed regulations, therefore, provide some flexibility in the revision of permits and recommend "creative permitting strategies" to account for foreseeable changes in operations. These approaches (currently in use in several States) includes a "permit in the alternative" in which the permit lists the pollutants and control requirements for different anticipated operating scenarios (including worst case emissions). Such a permit would specify the source's pollution control requirement for each anticipated process or product line to be used, obviating the need for additional approval when changes are made. A second means of creating additional flexibility is permitting by chemical class (rather than specific compounds) to allow certain groups of chemicals to be used interchangeably for permit purposes.

Another source of flexibility for smaller sources is the general permit. EPA is proposing a general permit to cover numerous similar sources. The source would apply for an individual permit consistent with the general permit, or alternatively, the general permit might be constructed so that it applies automatically to certain sources. See 56 Fed. Reg. at 21740.

1. Permit Revisions

The proposed rule creates three regulatory mechanisms to modify an existing permit to reflect administrative changes, minor process or operation changes, or

Act. EPA proposes that a minimum of seven days notice be given to the permitting authority before making a minor permit amendment. After a source waits the required seven days, the source may make the minor permit amendment unless the permitting authority objects.

2. **Compliance Problems**

We are concerned that the proposed operational flexibility may not be adequate. First, the proposed regulations do not recognize de minimis emission increases. In theory, if one additional can of paint is opened or one cigar smoked at a facility, it technically could constitute an emissions increase (in excess of permit limits) and would require a permit revision. Plant workers will have to be trained to recognize changes that might require permit revisions. Accordingly, additional guidance in the definition of "de minimis emission" is required if the permit program is to be feasible.

Second in order to take advantage of time-sensitive business opportunities, a seven day waiting period for minor permit amendments may be too long. This is a problem for manufacturing processes which produce a variable output, as well as processes that have a constant output, such as utilities, but which must react to a variable input (e.g., cheap or expensive coal, natural gas, etc.). Many industrial processes are extremely sensitive. Plant processes must be changed perhaps dozens of times per day, to coincide, for example, with changes in temperature or humidity, or to react to

5/ Environmentalists fear State authorities will be deluged with minor permit amendments and will be unable to respond within the seven day period, effectively giving sources an almost automatic approval for emissions increases. However, we expect that many States will routinely deny all permit modifications to avoid the seven day automatic approval.

major modifications. EPA is proposing that the permit shield discussed above apply to any permit provisions added or modified by any type of permit revision. *Id.* at 21744.

A change to a source that would constitute "a modification" under any provision of Title I of the Act (concerning hazardous air pollutants, or national ambient air quality standards for ozone, carbon monoxide, or particulate matter) requires a permit modification.^{4/} Permit modification anticipates the most radical changes to a source and has the most demanding review requirements. Permit modification requires the same State review and opportunity for EPA and public comment as the original permit issuance, except the review shall only cover the proposed changes. *Id.* at 21777.

An administrative permit amendment covers administrative changes including typographical errors, changes in address, phone number, ownership and others. *Id.* at 21768. EPA also is proposing to handle changes which have been processed under a State's preconstruction review process and approved by EPA as administrative changes. Administrative permit amendments require the permitting authority to respond to the change within 60 days. The 60-day response period is appropriate because administrative permit amendments do not impinge on operational flexibility. *Id.* at 21778.

The last and perhaps most controversial type of permit revision is the minor permit amendment. This covers changes to a facility that result in emissions above an existing permit level but do not rise to the level of "modification" under Title I of the

4/ Generally changes in operations that result in an increase of emissions of VOCs of at least 40 tons is considered a modification. The modification threshold for VOC emissions is set at a 25 ton increase level in serious and severe non-attainment areas. The threshold levels of what constitutes a modification for hazardous air pollutants is not established in the Act and probably will be determined on a pollutant-by-pollutant basis.

equipment casualties that occur. Processes that demand this degree of flexibility will have a difficult time complying with the proposed regulations.

Finally, the proposed regulations contemplate an 18-month lead time for permit renewal. This is excessive and "hampers operational flexibility. It requires a great deal of clairvoyance to anticipate product demand raw material availability and attendant plant line ups and emissions 18 months in advance.

D. **Fee Determination**

The EPA proposal requires source owners and operators to pay fees to fund the permit program. EPA is proposing several tests to judge the adequacy of=the fees charged by the State permitting authorities One option is the program support test The program support test is satisfied if the collection of revenues is sufficient to cover all reasonable direct and indirect costs of supporting the development and administration of the permit program Another option is the cost per ton test. The cost per ton test is satisfied with the collection of at least \$25 per ton of regulated pollutant. The term "regulated pollutant" does not include carbon monoxide. Emissions regulated under multiple provisions are only counted once. A program submitted by a State charging at least \$25 per ton will be assumed by EPA to satisfy the Act. A State can collect less than \$25 per ton provided it can satisfy the program support test. 56 Fed. Reg. at 21751-752 The permitting authority is not required to charge for emissions in excess of 4000 TPY. Fees shall be based upon actual rather than permitted levels of emissions for each source. Id at 21780.

Ultimately, sources subject to the proposed permit regulations will be funding the entire program This could result in a substantial burden to industry. Once a source

requires a permit, all emissions from the source are counted for purposes of fee determination. Large sources such" as utilities, will bear the majority of the costs, but smaller sources with proportionally less to spend will perhaps be more handicapped.

CONCLUSION

The proposed permit regulations will ultimately affect a large number of industrial facilities because of the proposed broad definition of source. These regulated sources will be responsible for submitting a permit application containing all necessary data including a determination of all applicable Act provisions. Although the permit is supposed to shield the source from additional requirements not set forth in a complete permit, there are many ways for EPA and the State to penetrate the permit shield.

The proposed regulations only allow for operational flexibility to the extent that a process change does not result in emissions that violate the permit's conditions. This would constitute a modification. Finally, the program is to be funded entirely from fees charged to sources. This could be a substantial burden on many sources due to the broad definition of source proposed by the regulations.

IX DEVELOPING ENVIRONMENTAL ISSUES FOR SHIPYARDS

CLEAN WATER ACT

Andrea B. Wenderoth

I. Clean Water Act Reauthorization

A. Senate Action

1. S. 1081- Introduced by Senator Baucus
2. Revisions By Senator Chafee
3. Vehicle for mark up will likely include provisions to increase funding for the state revolving fund program, address non-point source pollution, storm water management, pollution prevention, and combined sewer overflows.
4. Senate environment subcommittee on environmental protection plans to mark up S. 1081 some time this summer.

B. House Action

1. House Public Works Subcommittee on Water Resources is drafting a reauthorization bill, which it will likely markup this summer.
2. Legislation will likely address wetlands, extension and refinancing of the state revolving fund program, non-point source pollution, combined sewer overflows, and improving the storm water discharge control program.

C. Likelihood of Clean Water Act Reauthorization

II. Wetlands

A Background

1. All agencies with jurisdiction over wetlands developed a technical guidance manual for identifying and delineating jurisdictional wetlands.

B. 1991 Revisions to Manual

1. Revisions to the Manual were proposed in August 1991 that would increase the burden of proof required to identify and delineate a wetland.

2. Revisions would: (1) tighten the evidentiary requirements for demonstrating the presence of the three wetland parameters - wetland hydrology, hydrophytic vegetation, and hydric soils; (2) make it easier for the agencies to explain to landowners how to identify a wetland; and (3) improve the scientific validity of the agencies' delineation methods.

C. Current Status of Wetlands Delineation

III. Promulgation of Sediment Criteria

A. Background

1. Why EPA is developing a strategy.

B. Overview of EPA's Contaminated Management Strategy

1. General Principles of EPA's Strategy.

2. Dredged Materials Management Strategy



Questions And Answers On The Proposed Revised Federal Manual For Wetlands Delineation

PROPOSED R E V I S E D F E D 1 3 R A L ~ DELINEATION MANUAL QUESTIONS AND ANSWERS

BACKGROUND

What is the Section 404 program?

The Section 404 permit program regulates the discharge of dredged or fill material into waters of the United States, a term which includes most of the Nation's wetlands. This program is jointly implemented by the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps), with advice from the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). The Corps of Engineers handles the day-to-day administration of the program, including jurisdictional determinations, evaluating permit applications and deciding whether to issue or deny the permit, and enforcement. EPA has several significant statutory responsibilities in the program including development, with the Corps of the program's environmental standards (the Section 404(b)(1) Guidelines); restricting or prohibiting discharges that have unacceptable adverse effects (Section 404(c)); determining the scope of geographic jurisdiction; enforcement (EPA and the Corps both have enforcement authority); approval and oversight of State program assumption; and determining the applicability of permit exemptions for many agricultural and silvicultural activities under Section 404(f).

Statistics on Section 404 permit reviews and activities

Permit Activities - The Clean Water Act Section 404 program regulates the discharge of dredged or fill material into waters of the United States. In general, the Corps receives approximately 15,000 individual permit applications annually (this number includes both Section 404 and Section 10 applications). Of these 15,000 permit applications:

- approximately 10,000 permits (67%) are issued;
- approximately 500 permit applications (3%) are denied;
- approximately 4,500 permit applications (30%) are withdrawn by the applicant or qualify for a general permit.

In addition, approximately 75,000 minor activities are authorized each year through regional and nationwide general permits. General permits authorize activities in wetlands and other waters without the need for an individual permit review as long as these activities cause only minimal adverse environmental effects. Nationwide permit #26, in particular, authorizes activities involving discharges of dredged or fill material into 10 acres or less of isolated waters or headwaters streams (non-tidal streams where the average annual flow is 5 cubic feet per second or less). For activities that affect

between 1 and 10 acres of such waters, the applicant is required to notify the Corps of Engineers prior to proceeding with any discharge. In some States, general permits authorize activities covered by a State wetlands regulatory program.

Permit Review Period -- Approximately 92% of all permit evaluations (that is, both individual and general permits) are completed in less than 60 days after a completed permit application has been received by the Corps.

Individual permit applications that involve complex projects or sensitive environmental issues usually require more than 60 days to reach a decision. After a completed individual permit application has been received by the Corps:

- over 50% are processed in less than 60 days;
- approximately 25% percent are processed in 61 to 120 days;
- approximately 20% require 121 days to a year to process; and
- less than 5% require more than one year to process.

In addition, the Administration announced on August 9, 1991, a comprehensive plan for improving the protection of the Nation's wetlands, including a provision that permits will be deemed approved within six months unless the deadline is extended for good cause (see attached Fact Sheet **on** "Protecting America's Wetlands"). EPA and the Corps will provide further guidance as we move in this direction.

Statistics on Section 404(q) and Section 404(c) actions

Section 404(c) Actions - Section 404(c) of the Clean Water Act authorizes the Administrator of EPA to prohibit or restrict discharges of dredged or fill material into waters of the United States when such discharges would have unacceptable adverse effects on municipal water supplies, shellfish beds and fishery areas, wildlife or recreational areas. To date, EPA has completed only eleven Section 404(c) actions, out of an estimated 150,000 permit applications received since the Section 404(c) regulations went into effect in late 1979.

Section 404(Q) Actions - Pursuant to Section 404(q), the Corps and EPA have developed a process through a Memorandum of Agreement (MOA) to resolve any differences over permit decisions within a clear timeframe to minimize delays in the permit process. Since 1980 when the Section 404(q) MOA was first agreed to, EPA has requested Headquarters level review of a permit decision only 28 times out of an estimated 150,000 permit applications received throughout this period.

Further clarifying section 404 program: Are all uses of a wetland either regulated or prohibited? o

Much of the public is laboring under the misunderstanding that if an area is identified as a wetland, any activity that takes place in the wetland is either regulated or prohibited. This is not true.

First, not all activities in wetlands require a Section 404 permit. Section 404 only regulates the discharge of dredged or fill material into waters of the U.S., a term which includes most of the Nation's wetlands. Not all activities in wetlands involve a discharge of dredged or fill material, and therefore do not require a Section 404 permit. There are several development activities that cause wetland conversion or damage, but do not involve discharge of dredged or fill material. Under certain circumstances, these may include: lowering of groundwater levels, flooding of wetlands, drainage of wetlands, and excavation of wetlands where the dredged material is disposed of on an upland site.

Activities which are under the scope of the Section 404 program are not necessarily prohibited. Most of the activities subject to Section 404 requirements are either exempt from the program (such as ongoing farming and silviculture activities) or are authorized by one of the Corps' general permits.

Activities which are subject to Section 404 are authorized either through a **general** or individual permit. Activities in wetlands that cause only minimal adverse environmental effects are authorized under general permits. General permits do not require case-specific permit review and are designed to expedite permitting process. Approximately 75,000 activities out of **over 85,000** authorized activities every year, are authorized through general permits which are issued on a State, regional and nationwide basis. There are currently 26 nationwide general permits, and numerous state and regional general permits.

In addition, the Clean Water Act, under Section 404(f), generally exempts discharges associated with normal farming, ranching and forestry activities such as plowing, cultivating, minor drainage, and harvesting for the production of food, fiber and forest products or upland soil and water conservation practices. This exemption pertains to normal farming and harvesting activities that are part of an established, ongoing farming or forestry operation.

THE FEDERAL MANUAL

What is the 1989 Federal Manual?

In January 1989, EPA, the Corps, FWS and Department of Agriculture Soil Conservation Service (SCS) agreed to use one approach for delineating areas under the jurisdiction of Section 404 and Swampbuster. The four agencies adopted a single manual, referred to as the "Federal Manual for Identifying and Delineating Jurisdictional Wetlands" (the 1989 Federal Manual), which established a national standard for identifying and delineating vegetated wetlands. The purpose of the 1989 Federal Manual is to establish standard Federal technical criteria for identifying and delineating vegetated wetlands under Section 404 of the Clean Water Act and the "Swampbuster" provisions of the Food Security Act of 1985, as amended. The 1989 Federal Manual uses three categories of evidence (three parameters) to determine whether or not the technical criteria are met. These are: wetland hydrology, hydric soil characteristics, and hydrophytic vegetation.

The 1989 Federal Manual provides guidance on how to collect and use field indicators (such as free water, silt marks, wetland dependent plant species and organic soils) of these parameters to accurately identify and delineate wetlands.

Should the Federal Manual be solely relied on to identify and delineate jurisdictional wetlands?

No. The Federal Manual provides mandatory technical criteria for the identification and delineation of wetlands, and will be used to identify wetlands that are potentially subject to the jurisdiction of Section 404 of the Clean Water Act or the "Swampbuster" provisions of the Food Security Act of 1985, as amended. However, wetland jurisdictional determinations for regulatory purposes are based on other legal and policy criteria in addition to the Federal Manual's technical criteria (e.g., regulation guidance on normal circumstances as it pertains to prior converted croplands). Therefore, the appropriate agency policy should be consulted in conjunction with the Federal Manual when identifying and delineating jurisdictional wetlands.

THE 1989 FEDERAL MANUAL REVISION PROCESS

Why is the 1989 Federal Manual being revised? What was the goal of the Federal Manual revision process?

The goal of revising the 1989 Federal Manual is to improve the Federal Manual's ability to properly identify wetlands and to minimize the potential for erroneous wetlands determinations. When the 1989 Federal Manual was adopted, it was

anticipated by EPA the Corps, FWS and SCS that some additional guidance or clarification may be needed. After about a year of implementation of the Federal Manual, the four agencies agreed that specific technical changes would be appropriate to make the Federal Manual more effective and understandable.

The proposed revisions tighten the evidence requirements for the three parameters - hydrology, hydric soils, and hydrophytic vegetation - in the definition of wetlands. This approach to wetland delineation will make it easier for Federal or State agency staff to explain to landowners how wetlands are being delineated. The proposed revisions are intended to reduce the potential for erroneous wetland determinations - that is, identifying an upland as a wetland or conversely, identifying a wetland as upland. The proposed revisions are intended to be consistent with the definition of wetlands used by EPA and the Corps in implementing the section 404 program or by SCS in implementing the Swampbuster program.

The proposed revisions incorporate technical knowledge derived from its use in the past two years and from improvements in the state of science. The revisions address many of the issues raised during the public meetings and public comment period (the summer of 1990).

What was the revision process of the 1989 Federal Manual? What was the role of the public in the revision process?

After over a year of implementation of the 1989 Federal Manual the four agencies agreed that the Federal Manual needed additional clarification and changes. Because of the strong public interest in the Federal Manual, the four agencies provided the public several opportunities to provide technical comments as part of the revision process. Four public hearings were held in spring and summer 1990- in Baton Rouge, LA; Sacramento, CA; St. Paul, MN; and, Baltimore, MD. In addition, written comments on the 1989 Federal Manual were also accepted subsequent to the meetings. More than 500 letters were received and reviewed. We believe that this process has provided substantial and meaningful information. Results of formal field testing conducted by EPA to evaluate the sampling protocols of the 1989 Federal Manual and reviews by field staff of the four signatory agencies using the Federal Manual were also reviewed and considered in developing recommended revisions.

What was the role of the technical committee?

The Federal Interagency Committee for Wetland Delineation is a technical committee composed of technical staff from the four agencies that developed the 1989 Federal Manual: Environmental Protection Agency, Corps of Engineers, Soil Conservation

Service, and Fish and Wildlife Service. The role of the technical committee in the revision process was to recommend technical revisions to the 1989 Federal Manual based on field experience and technical comments from the public during the public meetings and public comment period scheduled in 1990. The technical committee completed their revisions in the spring of 1991.

Have the four agencies agreed to the proposed revised Federal Manual?

The four agencies, the Environmental Protection Agency, Department of Defense, Department of Agriculture, and Department of Interior have agreed to the Federal Register Notice of the proposed Federal Manual and agreed that the Federal Manual is ready for public comment

To what extent does policy affect the proposed revisions to the Federal Manual?

The purpose of the Federal Manual is to establish standard Federal technical criteria for identifying and delineating vegetated wetlands. Therefore, the Federal Manual primarily deals with the technical criteria consistent with the regulatory definitions of wetlands. However, the Federal Manual is not solely a technical document. There are policy issues addressed in the proposed revised Federal Manual. A key policy consideration is for example, the determination of "normal circumstances" under the regulatory definition of wetlands. Another is the extent of evidence necessary for each of the three criteria in order to make a positive wetland determination.

Do the agencies plan to field test the revised Federal Manual before it is finalized and implemented ?

Yes. The four agencies are planning to fully field test the revised Federal Manual before finalizing it. The intent of the field testing which we expect to occur while the Federal Manual is under public review, is to verify its technical validity in delineating wetlands, assure its ease of implementation and reveal any unanticipated effects. We are also interested in evaluating the applicability of the Federal Manual to all regions of the country. The Corps will coordinate field testing among the four agencies at the ~ field level.

An independent expert panel will also field test the revised Federal Manual. Upon completion of field testing the expert panel as well as the regions and district offices of the four agencies will provide recommendations to the agencies to assist in developing necessary final revisions to the Federal Manual. We also encourage other interested parties to conduct field tests of the proposed revised Federal Manual and provide recommendations during the public comment period.

PUBLIC INPUT IN THE REVISION PROCESS

Will the public have an opportunity to comment on the proposed revised Federal Manual?

Yes. The proposed revised Federal Manual was published on August 14, 1991, in the Federal Register for public comment. The public is invited to review and provide technical comments on the proposed revisions. Written comments must be submitted on or before October 15, 1991. Copies of the proposed revised Federal Manual are also available through the Wetlands Hotline at (800) 832-7828.

The revisions will be implemented only after the public comments have been reviewed and considered, and a final Federal Manual has been issued. We encourage interested parties to conduct field tests of the proposed revised Federal Manual and provide recommendations during the public comment period. In addition an independent panel of experts will field test the proposed revised Federal Manual. The expert panel will provide recommendations to the agencies to assist in developing necessary revisions to the Federal Manual.

Will there be public hearings held on the proposed revised Federal Manual?

There are no public hearings scheduled. Specific detailed questions about the proposed revised Federal Manual can be referred to individuals identified in the Preamble of the Federal Register notice.

Will the proposed revised **Federal Manual** undergo public comment in accordance with the Administrative Procedure Act (APA)?

The position that this Federal Manual is a technical guidance document which is not required by law to go through Administrative Procedure Act (APA) legislative rulemaking procedures has been upheld in court with respect to the 1989 wetlands delineation; Manual. However, the Federal Manual was published on August 14, 1991, in the Federal Register, with a 60-day period for public review and comment.

Will the Federal Manual be issued as a regulation?

The agencies believe that it would be appropriate and in the public interest to include parts of the final Federal Manual in the Code of Federal Regulations. When the agencies determine what portions of the Federal Manual should be issued as a regulation, they will provide notice of specific proposed regulatory language in the Federal Register at least 30 days prior to the end of the public comment period. The regulatory language will be subject to the Administrative Procedure Act rulemaking process.

KEY CHANGES TO THE FEDERAL MANUAL

What are the major revisions **to** the 1989 Federal Manual?

The major revisions and other major issues identified in the Preamble to the Manual include the following

1) The Three Criteria:

- Clarify that, except in limited specified circumstances, demonstration of all three parameters (wetland hydrology, hydrophytic vegetation and hydric soils) is required for delineating vegetated wetlands.

2) Limited Specified Exceptions to the Three Criteria:

- Clarify that independent indicators of all three parameters are required UNLESS the area is a disturbed wetland or the area is specifically listed in the proposed Federal Manual as an exception.
- Specifically identify exceptions (i.e., playa lake, prairie pothole, vernal pool, pocosin, and other special wetlands that fail the hydrophytic vegetation criterion such as Tamarack Bogs, White Pine Bogs and Hemlock Swamps). Exceptions are widely recognized valuable wetland types that may fail to meet one or more of the 3 criteria during all or some part of the year.
- Request public comment on the listed exceptions as well as potential additions to the list, and on recommendations for identifying appropriate indicators for each wetland type listed as an exception.

3) Wetland Hydrology Criterion:

- Require inundation for 15 or more consecutive days, or saturation to the surface for 21 or more consecutive days during the growing season.
- Require saturation at the soil surface.
- Narrow the wetland hydrology indicators to exclude Hydric Soils and Wetland Vegetation as hydrology indicators.

- Separate the list of wetland hydrology indicators into primary and secondary indicators. Primary indicators are more reliable and can be used alone to meet hydrology criterion. Secondary indicators are weaker and can only be used with corroborative information.
- Remove water stained leaves, trunks, and stems as wetland hydrology indicators; public comments are requested in the Preamble regarding their reliability as indicators of hydrology during the growing season and whether they should be primary or secondary indicators.
- Incorporate localized differences in the growing season; the Preamble solicits comments on the definition of the growing season.
- Request public comments on three alternatives to identifying and delineating seasonally harder to identify wetland types that are NOT exceptions to the criteria but may not demonstrate indicators of one or more of the 3 criteria during certain (e.g., dry) times of the year.

4) Hydric Soils Criterion:

- Specifically state that hydric soils must be field-verified; hydric soils maps alone are not sufficient evidence of hydric soils.
- Clarify that the three wetland criteria are mandatory except in specified circumstances, and therefore the presence of mapped hydric soils alone cannot be used to delineate an area as a wetland.
- Incorporate localized differences for certain hydric soil phases.

5) Wetland Vegetation Criterion:

- Propose the prevalence index approach - that is, an area meets this criterion if, under normal circumstances, a frequency analysis of all species within the community yields a prevalence index value of less than 3.0 (where OBL = 1.0, FACW = 2.0, FAC = 3.0, FACU = 4.0, and UPL = 5.0).
- Request public comments on including the Facultative Neutral test as part of the hydrophytic vegetation criterion in addition to the proposed prevalence index approach. Under this proposed approach the criterion would be met if after discounting all

dominant facultative (FAC) plants, the number of dominant obligate wetland (OBL) and facultative wetland (FACW) species exceeds the number of dominant facultative upland (FACU) and obligate upland (UPL) species. (Note: a number of options are presented describing circumstances under which the prevalence index procedure would be used.)

Do the proposed revisions address concerns raised by the public?

The 1990 public comment period and public meetings resulted in a substantial and useful record of concerns and recommendations that were considered in developing the proposed revisions to the Federal Manual. The 1990 public record focused the agencies' review on key issues, including the wetland hydrology criterion, concern that wetlands determinations were based on less than all three of the basis parameters (hydrology, vegetation, and soils), and in some cases on only one parameter; concern that areas are dry at the surface (potentially all year round) are considered wetlands based on the presence of water as deep as 18 inches below the surface the definition of the growing season; the assumption that facultative vegetation can indicate wetland hydrology, which provided opportunities for misuse. The proposed revisions address these and other concerns raised by the public.

Do the proposed revisions change the definition of wetlands?

No, the proposed revisions do NOT change the regulatory definition of wetlands used by EPA and the Corps in implementing the Section 404 program or SCS in implementing the Swampbuster program. They are intended to be consistent with the regulatory definitions of wetlands in these programs. However, the agencies are committed to including parts of the final Federal Manual in the code of Federal Regulations to clarify the criteria by which the definition of wetlands is interpreted.

Is the proposed revised Federal Manual a three-parameter approach?

Yes. Independent indicators of all three parameters are required unless the area is a disturbed wetland or an area is a specifically described exception (i.e., playa lake, prairie pothole, vernal pool, pocosin, or other special wetlands that fail the hydrophytic vegetation criterion). Exceptions are widely recognized valuable wetland types that may fail to meet one or more of the three criteria during all or some part of the year. Disturbed wetland areas include situations where field indicators of one or more of the three wetland identification criteria are obliterated or not present due to recent change such as removal of vegetation.

How is the growing season defined in the proposed revised Federal Manual?

The growing season in the proposed revised Federal Manual is the interval between three weeks before the average date of the last killing frost in the spring to three weeks after the average date of the first killing frost in the fall, with exceptions for wetland areas experiencing freezing temperatures throughout the year (e.g., montane, tundra and boreal areas) that nevertheless support hydrophytic vegetation. This growing season for a particular area can be determined by consulting local weather data.

EFFECTS OF THE REVISIONS TO THE FEDERAL MANUAL

Will the revisions make it harder to get a Section 404 permit?

No, the revisions will not affect the Section 404 permit process for those areas identified as jurisdictional wetlands. When a revised Federal Manual is implemented, like the 1989 Federal Manual, will only identify whether or not an area is a jurisdictional wetland. It will not change the permit evaluation process.

However, EPA and the Corps continue to respond to concerns raised over the complexity and time consumed by the permit application process by making other administrative changes. These include working on joint permitting procedures with interested states proposing new nationwide and regional permits for activities in wetlands that have minimal environmental impacts, developing joint guidance to clarify existing policies, encouraging coordination between permit applicants and Federal agencies prior to permit application, and providing more accessible information about wetlands through the EPA Wetlands Hotline at (800) 832-7828.

In addition, the Administration announced on August 9, 1991, a comprehensive plan for improving the protection of the nation's wetlands, including measures to improve the Section 404 regulatory program (see attached Fact Sheet on "Protecting America's Wetlands"). EPA and the Corps will provide further guidance as we move in this direction.

What is the effect of the revisions to the scope of jurisdiction?

The extent of potential changes in jurisdiction will be identified during the field testing. The proposed revisions are intended to reduce the potential for erroneous wetland determinations - that is identifying an area as a wetland that is not a wetland or conversely, identifying a wetland as upland.

One of the goals of the proposed revision process is to clarify to the public what areas are wetlands. Over the past two years much of the controversy over the scope of

jurisdiction resulted from the widespread misunderstanding that the presence of a mapped hydric soil alone identified a wetland, Without any supporting evidence of wetland hydrology or hydrophytic vegetation. This is not true. To reinforce this point, stronger indicators of wetland hydrology are required in the proposed revisions independent of indicators used to demonstrate the presence of hydric soils or hydrophytic plant communities.

Proposed revisions have been made to a number of different sections of the Federal Manual making it difficult to precisely predict the effect of the proposed revisions to the scope of jurisdiction without field testing by qualified personnel. We expect that the field testing of the proposed revised Federal Manual that will be conducted during the public review period will more specifically identify the effects of proposed revisions and help us to respond to any unanticipated impacts.

Has the proposed revised Federal Manual changed the way wetlands ‘are identified or delineated in disturbed areas such as cropland’?

The revised Federal Manual provides two important clarifications in the procedures for identifying wetlands in disturbed areas. First, the Federal Manual recognizes that there are Federal agency policies under the Clean Water Act Section 404 regulatory program and under the Swampbuster program of the Food Security Act of 1985, as amended which should be consulted when interpreting the effect of disturbances such as cropping” on the jurisdictional status of an area (e.g., regulatory guidance on normal circumstances as it pertains to prior converted croplands). Second, the disturbed areas section of the Federal Manual states clearly that the mere presence of soils meeting the hydric soil criterion is not sufficient to determine that wetlands are present. When the hydrology of an area has been significantly altered, soil characteristics resulting from wetland hydrology cannot by themselves verify wetland hydrology since they persist after wetland hydrology has been eliminated.

OTHER ONGOING ADMINISTRATIVE ACTIONS

What coordination occurs among EPA Regional staff, Corps District personnel and permit applicants to facilitate the Section 404 permit review process?

Permit applicants are encouraged to initiate pre-application meetings with regional staff from the Corps, EPA and other commenting agencies to discuss concerns that these agencies might have with a proposed activity and to resolve differences prior to an application being submitted. In so doing, the actual permit review period may be significantly reduced. In order to facilitate these discussions, numerous Corps Districts hold regularly-scheduled (e.g., quarterly, monthly) meetings for applicants and other

agencies including EPA. This early coordination is especially important for controversial projects involving significant environmental impacts.

In addition, EPA and Corps staff are encouraged to work together to resolve differences regarding individual permit applications (e.g., project alternatives, mitigation requirement specific permit conditions) early in the review process.

Coordination among agencies on the development of regional and general permits under the Section 404 regulatory program creates additional opportunities to expedite the permit process for projects with minor environmental impact. Guidance from EPA and Corps Headquarters (e.g., Memoranda of Agreement, Corps Regulatory Guidance Letters) reduces or eliminates confusion and controversy sometimes associated with implementation of the Section 404 regulatory program that might otherwise lead to delays during permit review.

Finally, the Administration announced on August 9, 1991, a comprehensive plan for improving the Section 404 regulatory program including measures for effective coordination among the agencies (see attached Fact Sheet on "Protecting America's Wetlands"). EPA and the Corps will provide further guidance as we move in this direction.

What administrative steps other than the Federal Manual are EPA and the Corps taking to concerns raised about 404 program?

The Administration announced on August 9, 1991, a comprehensive plan for improving the protection of the nation's wetlands, including measures to improve the Section 404 regulatory program (see attached Fact Sheet on "Protecting America's Wetlands"). EPA and the Corps will provide further guidance as we move in this direction.

In addition, in response to specific regional and State concerns about timeliness and complexity of the Section 404 regulatory program, EPA and the Corps have employed a variety of administrative tools to respond to specific concerns without reducing our ability to protect wetlands.

Joint Policy Guidance - EPA and Corps Headquarters have issued policy guidance (e.g., Memoranda of Agreement, Corps Regulatory Guidance Letters) intended to reduce or eliminate confusion and controversy sometimes associated with implementation of the Section 404 regulatory program. Such guidance has helped reduce delays during permit review and clarified which activities or areas are subject to the Section 404 program. For example, in response to concerns raised regarding activities in areas subject to agriculture, the Corps issued Regulatory Guidance Letter 90-7 which clarified that prior converted cropland (estimated up to 60 million acres) are NOT subject to Section 404

Section 404 jurisdiction. This made the Section 404 program more consistent with the Swampbuster provisions of the Farm Bill, thereby *increasing* consistency between Federal wetlands programs.

General Permits - General permits may be issued on a state, regional or nationwide basis. The general permits are designed to expedite the permitting process as long as authorized activities do not result in more than minimal environmental harm. At this time, there are 26 nationwide permits in effect, and the Corps is currently proposing additional nationwide permits. In addition, EPA and the Corps have been working with the States of Maryland, Georgia and Mississippi to develop State and regional program general permits.

Joint Federal/State Processing - EPA and the Corps have also developed Memoranda of Agreement with States to set up systems to increase consistency in joint Federal/State permit processing. For example, EPA Region 9 and Corps South Pacific Division have developed a Memorandum of Agreement with the California Department of Transportation to provide clear guidance on mitigation requirements.

Early Coordination - EPA and Corps staff work together to resolve differences regarding individual permit applications (e.g., project alternatives, mitigation requirements, specific permit conditions) early in the review process. Permit applicants are encouraged to initiate pre-application meetings with regional staff from the Corps, EPA and other commenting agencies to discuss concerns that these agencies might have with a proposed activity and to resolve differences prior to an application being submitted. In so doing the actual permit review period may be significantly reduced. In order to facilitate these discussions, numerous Corps Districts hold regularly-scheduled (e.g., quarterly, monthly) meetings for applicants and the other agencies including EPA

Fostering Partnerships with State and Local Programs - Over the last two years, EPA has increased its work with States on wetlands protection through the State Wetlands Protection Grants Program. Thirty-eight States are receiving EPA funding eleven of which are developing State Wetlands Conservation Plans. These plans include developing comprehensive statewide strategies for strengthening and coordinating the many programs that affect wetlands in a State, and can lead to additional administrative reforms in certain geographic areas, more effective communication between government agencies and the regulated sector and conflict avoidance between wetlands protection and development proposals.

Additional States and Indian tribes are using grants to develop classification systems; inventory wetlands; develop restoration, creation and enhancement programs; assess the effects of site-specific mitigation requirements and design “wetland banks” to account for wetlands losses and gains.

EPA and the Corps have assisted local governments such as Eugene, OR, Bellevue, WA, Boulder, CO and Union City, CA in preparing local wetlands management plans as a portion of the city's general plan. EPA and the Corps also continue to assist in the preparation of state and local government Advance Identification (ADID) plans and special wetland area management plans.

Classification - EPA has also been investigating whether classification of wetlands into few broad groups based on their functional value and consequently, whether developing an explicit set of corresponding regulatory responses, is an appropriate approach in the Section 404 regulatory program. In addition, as part of a comprehensive plan to improve the Section 404 program the Administration will establish an interagency technical committee to define a limited number of wetland categories.

Providing Accurate Information To increase awareness about the requirements of the Section 404 program and to provide easy, rapid access to accurate information on the Section 404 program and other federal wetland protection efforts, EPA has established a "Wetlands Hotline." This toll free service (800-832-7828) provides information on wetland protection efforts.

In addition, documents such as a brochure distributed to the farm community on "Agricultural Activities in Wetlands that are Exempt from the Section 404 Permit Process of the Clean Water Act," have been prepared to help clarify activities which are not regulated under Section 404.

For additional information regarding these ongoing administrative actions by EPA contact J. Glenn Eugster, Wetlands Division, Washington D.C., at (202) 382-5043.

OBTAINING COPIES OF THE REVISED FEDERAL MANUAL

Copies of the proposed revised Federal Manual can be obtained from the EPA Wetlands Hotline at (800) 832-7828. Hotline representatives can also provide referrals for answers to questions regarding the revised Federal Manual.

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release

August 9, 1991

FACT SHEET

PROTECTING AMERICA'S WETLANDS

The President announced today a comprehensive plan for improving the protection of the nation's wetlands. Wetlands serve an important role in flood control; they help filter wastes from water; they provide an important habitat and breeding ground for fish, birds and animals; and they are an important recreational resource.

Three quarters of the remaining wetlands are privately owned, and the pressure to serve other valid human needs often comes in conflict with conservation. A coordinated wetlands policy requires balancing all these interests.

The President believes we must look beyond regulation to encourage wetlands protection. We must enhance public understanding of the value of wetlands as well as support non-regulatory programs that encourage private, state and local actions to conserve wetlands.

The Administration has a three-part plan to slow and eventually stop the net loss of wetlands, taking a significant step toward the President's goal of no net loss of wetlands:

1. Strengthen wetlands acquisition programs and other efforts to protect wetlands;
2. Revise the interagency manual defining wetlands to ensure that it is workable; and
3. Improve and streamline the current regulatory system.

Wetlands Expansion Measures

Since taking office, the Bush Administration has proposed:

The purchase of approximately 450,000 acres, at a cost of over \$200 million, of critical wetlands habitat;

- A 48 percent overall funding increase for wetlands protection efforts in the FY 1992 budget to \$709 million;
- A nearly three-fold increase, from \$16 million in FY 1989 to \$45 million in FY 1992, for wetlands R&D programs;
- The establishment, under the provisions of the 1990 Farm Bill, of a 600,000 acre wetlands reserve.

To ensure further progress towards the no net loss goal, the Administration today proposed several new initiatives to enhance wetlands protection on Federal and private lands. These include:

- Fully funding the Wetlands Reserve Program in the 1990 Farm Bill. The 1990 Farm Bill authorized the purchase of up to 1 million acres of wetlands. The Administration will work for this amount in FY 1993 and future budgets.
- Initiating an Administration-wide wetlands restoration and creation program on Federal lands. Many agencies, including Interior, EPA, Defense, Commerce, and Energy, have the potential to engage in restoration and creation programs. These activities will be strengthened and coordinated through a standing interagency task force that will develop an overall policy for the most effective use of new and existing Federal resources.
- Continuing to make wetlands a priority in the allocation of Land and Water Conservation Funds (LWCF). The Administration will seek to maintain or increase funding for this program. Moreover, it will target a portion of State LWCF funds to wetlands.
- Continuing and expanding the existing satellite monitoring program to periodically assess national wetland trends. Satellite imagery provides up-to-date information on the status and trends of wetlands, and can help in conducting periodic change analysis of high-value wetland areas. The Administration is accelerating and improving our national inventory of wetlands, with more geographically targeted reporting, and monitoring of the ecological health of our wetlands.
- Expanding research on wetlands. Several agencies independently conduct research on wetlands. The Administration is establishing a process to coordinate, consolidate and establish priorities for wetlands research.

- Focusing public outreach and education programs on informing the regulated community about Federal wetlands regulations.
- Revising the existing Executive Order on wetlands to emphasize wetlands stewardship on Federal lands and the acquisition of valuable wetlands. The Administration will revise the Executive Order to include a commitment to the no net loss goal.

Delineation Manual

On January 10, 1989, the Environmental Protection Agency, the Army Corps of Engineers, the Fish and Wildlife Service, and the Soil Conservation Service issued a joint Federal Manual for the Identification and Delineation of Wetlands to address inconsistencies in practice among the agencies. The Manual established the technical criteria and procedures used to define a wetland.

In response to public comments and field hearings, the Administration is sending to the Federal Register today a revised Manual that will incorporate changes to clarify the scope and application of the Manual. The revised Manual will be issued as a proposal and as guidance to the agencies; the public will be invited to comment on the Manual before it is made final.

Streamlining Wetlands Regulations and Adding Flexibility

Under section 404 of the Clean Water Act a landowner must receive a permit from the Corps of Engineers before adding dredged or fill material to a wetland. The Administration will take the following actions to improve the workability of the 404 regulatory program.

A. Streamline the Permitting Process

To streamline the regulatory process, the Administration proposes a number of reforms to ensure more timely decisions and effective coordination among agencies. These include requirements to:

- Issue a regulatory guidance letter providing that meetings and other interactions between the public, applicant and Federal government will be coordinated through a single agency, the Army Corps of Engineers. The Corps would serve as the project manager, and will be responsible for all consultations with other agencies on the permit applications and for determining the final permit condition;

- Encourage attendance by all interested agencies at the pre-application meetings with the permittee and early consultation on the types and location of mitigation that will be required if wetland losses occur;
- Initiate a wetlands delineation training program for private consultants and better train agency field staff on wetlands functions, values and delineation, using cross-agency training programs to the extent appropriate;
- Deem permits approved within six months if an agency does not extend the deadline for good cause as determined by the Corps of Engineers;
- Require consulting agencies to provide site specific information when commenting on individual permits;
- Replace consulting agency appeals of individual permits with appeals based on resources or issues of national significance; and
- Expand the use of general permits.

B. Wetlands Categorization

The Administration will establish an interagency technical committee to define a limited number of major wetland categories based on function, value, and the relative scarcity or abundance of different wetlands. The technical committee will complete its work within 18 months and will consult with outside experts in defining the categories.

C. Mitigation Banking

The technical committee will also refine the details of a market-oriented mitigation banking system based on the categories it defines. The mitigation banking system will be designed to provide adequate incentives for the private restoration or creation of wetlands that can be used to mitigate the effects of developed wetlands. The mitigation banking system will:

- Allow permit applicants to satisfy compensatory mitigation requirements through the use of "mitigation credits;"
- Presume satisfaction of permit conditions if the mitigation credits are from the same or from a higher wetland category; and

- Replace the preference for on-site mitigation for all wetlands except those in the highest wetland category with a preference for mitigation within States or within major hydrological units which may cross State lines.

D. Permit Conditions for Wetlands

The Administration proposes to maintain the process known as sequencing for the high-value wetland category. Permit applicants involving wetlands in the remaining categories will be required to offset wetland losses through compensatory mitigation. States with less than a 1 percent historic rate of wetlands development will be able to satisfy permit requirements through minimization. The Administration will also establish general permits for low-value wetlands.

E. Increasing State Role

To increase the role of States in the wetlands permitting process; the Administration will issue guidance to encourage greater use of Regional and State General Permit Programs. States which assume delegation of the 404 program will be given flexibility, to the extent allowed by current law, to tailor the wetland categories based on State resources. State programs would be approved as long as the program achieves on balance the same environmental benefits as the Federal program.

The Administration also supports legislation to allow permitting of wetlands near navigable waters by States that assume responsibility for the permit program.

F. Modifying the Coverage of the Program

The Administration supports legislation to expand the scope of the 404 program to include other activities which may destroy wetlands besides the addition of fill material. The Administration will also take steps to exempt man-made wetlands which are not used for purposes of mitigation and whose creation was not subsidized by the Federal government. The Administration will also clarify that normal farming, ranching and silvicultural activities generally are exempt from the 404 program, and that lands exempted from the Swampbuster program are similarly not covered.



Side- By-Side Comparison Of The 1989 Manual And Proposed Revised Manual

BASING WETLANDS DETERMINATIONS ON 3 PARAMETERS - HYDROLOGY, VEGETATION, AND SOILS

1989 MANUAL:

Evidence of all 3 parameters are required, BUT could assume hydrology from vegetation or soils IF area was disturbed.

Could assume vegetation from soils and hydrology.

Could assume soils from certain vegetation.

PROPOSED REVISED MANUAL

Independent indicators of all 3 parameters are required UNLESS the area is a disturbed wetland or the area is a specifically described exception (e.g., playa lake, prairie pothole, vernal pool, pocosin and other special Wetlands that fail the hydrophytic vegetation criterion). Exceptions are widely recognized valuable wetland types that may fail to meet one or more of the 3 criteria.

Requests public comment on the listed exceptions as well as potential additions to the list, and on recommendations for identifying appropriate indicators for each wetland type listed as an exception.

Requests public comment on three alternatives to identifying and delineating seasonally harder to identify wetland types that are NOT exceptions to the criteria, but may not demonstrate indicators of one or more of the 3 criteria during certain (e.g., dry) times of the year.

DURATION OF INUNDATION AND/OR SATURATION IN THE WETLAND HYDROLOGY CRITERION

1989 MANUAL:

Requires inundation or saturation for one week or more during the growing season.

PROPOSED REVISED MANUAL

Requires inundation for 15 or more consecutive days, or saturation to the surface for 21 or more consecutive days during the growing season.

1989 MANUAL

Requires saturation to the surface at some point in time during the growing season.

Saturation to the surface would normally occur when, for one week or more, the water table is within:

- . 6 inches of the soil surface in somewhat poorly drained mineral soils,
- . 12 inches of the soil surface in poorly drained or very poorly drained mineral soils, or
- . 18 inches of the soil surface in poorly drained or very poorly drained mineral soils with low permeability (less than 6 inches per hour).

The above-listed depths to the water table were intended to correspond to= saturation to the surface caused by capillary action above the water table.

PROPOSED REVISED MANUAL

Requires inundation and/or saturation at the surface.

1989 Manual depths to water table as indicators of surface saturation are deleted; replaced by a test for water that can be squeezed or shaken from the surface soil to ensure that capillary action is saturating the soil at the surface.

TECHNICAL VALIDITY OF ACCEPTABLE INDICATION INDICATORS OF WETLAND HYDROLOGY

1989 MANUAL:

The list of wetland hydrology indicators included both strong and weak indicators, each of which alone could be used to meet the wetland hydrology criterion.

Hydric soil characteristics alone also could be used to meet the hydrology criterion.

PROPOSED REVISED MANUAL:

Eliminates hydric soil characteristics as hydrology indicators.

Separates list of hydrology indicators into primary and secondary indicators.

Primary indicators are more reliable and can be used alone to meet hydrology criterion.

Secondary indicators are weaker and can only be used with corroborative information. This corroborative information must be of sufficient quality and extent that when taken together with secondary indicators clearly supports the presence of wetland hydrology for the necessary time, duration, and frequency.

Requests public comment on the validity of secondary indicators.

Removes water-stained leaves trunks, or stems and requests public comment on including this as indicators of hydrology, their reliability as indicators of hydrology and whether they should be primary or secondary indicators.

Solicits comments on the data requirements for hydrologic records (e.g., cutoff for “normal rainfall” years) to document that the wetland hydrology criterion has been met.

DEFINITION OF GROWING SEASON

1989 MANUAL

Used growing season zones mapped in broad bands across the country according to soil temperature regimes.

PROPOSED REVISED MANUAL

Growing season is based on local weather data, and will be from 3 weeks before the last killing frost in the Spring to 3 weeks after the first killing frost in the Fall, except for areas that experience freezing temperatures throughout the year, where appropriate local growing seasons will be applied. The local weather data will be available on a local level, e.g. the county level.

Solicits comment on this definition.

PUBLIC INPUT TO THE REVISION PROCESS

1989 MANUAL

As an interpretation of the existing regulatory definition of wetlands, the Manual was not required to go through notice and comment rulemaking. There was no opportunity for public input on the Manual prior to its issuance or implementation.

PROPOSED REVISED MANUAL

The Agencies held 4 public meetings last Summer and accepted written comments on the 1989 Manual until September 28 1990. These comments were considered in developing the proposed revisions.

The Manual will be formally proposed in the Federal Register. The position that this Manual is a technical guidance document which is not required by law to go through Administrative Procedure Act (APA) legislative rulemaking procedures has been upheld with respect to the 1989 wetlands delineation manual in Hobbs v. United States, 32 Env't Rep. Cas.. (BNA) 2091 (ED. Va. 1990), appeal pending, No. 90-1861 (4th Cir.). Nonetheless the agencies believe that it would be appropriate and in the public interest to include parts of the final manual in the Code of Federal Regulations. When the agencies determine what portions of the manual that may be promulgated as a legislative rule, they will provide notice of specific proposed regulatory language in the FEDERAL REGISTER at least 30 days prior to the end of the public comment period. The regulatory language will be subject to the Administrative Procedure Act rulemaking process.

HYDROPHYTIC VEGETATION CRITERION

1989 MANUAL

Requires under normal circumstances: 1) more than 50% of the composition of the dominant species from all strata are-obligate wetland facultative Wetland, and/or facultative wetland species; OR 2) the prevalence index approach (that is, under normal circumstances, a frequency analysis of all species within the community yields a prevalence index value of less than 3.0 (where OBL = 1.0, FACW = 2.0, FAC = 3.0, FACU = 4.0, and UPL = 5.0).

PROPOSED REVISED MANUAL:

Proposes the prevalence index approach - that is, an area meets this criterion if, under normal circumstances a frequency analysis of all species within the community yields a prevalence index value of less than 3.0 (where OBL = 1.0, FACW = 2.0, FAC = 3.0, FACU = 4.0, and UPL = 5.0).

Solicits comments on including the Facultative Neutral test as part of the hydrophytic vegetation criterion in addition to the proposed prevalence index approach Under this approach the ‘criterion would be met if after **discounting** all dominant facultative (FAC) plants, the number of dominant obligate wetland (OBL) and facultative wetland (FACW) species exceeds the number of dominant facultative upland (FACU) and obligate upland (UPL) species. (Note: a number of options are presented describing circumstances under which the prevalence index procedure would be used.)

Solicits comments on variants of the FAC neutral test.

STATUS OF DELINEATIONS BASED ON THE 1989 FEDERAL MANUAL

1989 MANUAL

Required the use of 1989 Manual for delineation and such delineations were final.

PROPOSED REVISED MANUAL

Any landowner whose land has been delineated a wetland after the revised Manual is proposed but before the proposed revised Manual becomes final may request a new delineation following publication of the final revised Manual. However, final actions, such as permit issuances or completed enforcement actions, already taken on wetlands delineated under the 1989 manual will not generally be reopened.

A landowner whose property has been identified as a wetland during a seasonal dry period or drought can request a re-evaluation in the field during the wet season of the year.

The agencies are soliciting comment on the likelihood of sites being delineated during the dry season as wetland that if the delineation had occurred during the wet season, would not have met the hydrology criterion. Should requests for re-evaluations be limited to certain cases or should all requests be granted?

DEFINITION OF A DISTURBED WETLAND AREA AND ITS DELINEATION PROCEDURES

1989 MANUAL:

Disturbed wetland areas include situations where field indicators of one or more of the three wetland identification criteria are obliterated or not present due to recent change.

For disturbed areas where vegetation is removed and no other alterations have been done, the presence of hydric soils and evidence of wetland hydrology will be used to identify wetlands. If such evidence is found, conditions are assumed to be sufficient to support hydrophytic vegetation.

PROPOSED REVISED MANUAL

Disturbed wetland areas are wetlands that met the mandatory criteria prior to disturbance and have had vegetation, soils, and/or hydrology altered such that the required evidence of the relevant indicators for the affected criteria has been removed. If a disturbed area is identified as a wetland, field personnel shall document the reasons for determining that the site would have been a wetland but for the disturbance.

For disturbed area where the vegetation is removed and no other alterations have been done, evidence of the elimination of the hydrophytic vegetation together with the presence of hydric soils and evidence of wetland hydrology must be used to identify wetlands.

ALTERNATIVE APPROACH TO DELINEATION ON A SITE-SPECIFIC BASIS

1989 MANUAL:

Sites are delineated individually.

PROPOSED REVISED MANUAL:

Sites are delineated individually.

Solicits comments on alternative approaches that would allow identification of categories that can be identified ,and delineated rapidly and without the need for extensive documentation.

**POLLUTION PREVENTION ACT OF 1990
REPORTING REQUIREMENTS
AND TRENDS IN IMPLEMENTATION OF
SARA SECTION 313**

**JOHN L. WITTENBORN
COLLIER, SHANNON & SCOTT**

**PRESENTATION FOR
NATIONAL SHIPBUILDING RESEARCH PROGRAM
MAY 6, 1992**

**POLLUTION PREVENTION
ACT OF 1990**

POLLUTION PREVENTION ACT OF 1990

The Pollution Prevention Act of 1990 (PPA) Is designed to reduce the amount of pollution generated by:

- Establishing a source reduction program at EPA; and**
- Assisting states in providing:**
 - Information; and**
 - Technical assistance.**

POLLUTION PREVENTION ACT OF 1990

(continued)

To achieve these goals, PPA charges EPA to:

- **Establish a pollution prevention office;***
- **Establish a pollution prevention strategy;***
- **Provide matching grants to states for programs to promote source reduction;**
- **Establish a source reduction clearinghouse;***
- **Collect source reduction and recycling data; and**
- **Submit biennial program reports to Congress.**

***These functions already exist at EPA.**

IMPACT OF PPA ON EPCRA SECTION 313

- **The source reduction and recycling data collection provisions apply to all facilities and chemicals covered under EPCRA Section 313.**
- **The data must be reported on EPA Form R and will be publicly available through the TRI Database.**
- **The first report incorporating these provisions is due July 1, 1992, covering the 1991 reporting year.**
- **These changes are reflected in the ‘Toxic Chemical Release Reporting; Pollution Prevention Information’ proposed rule published in the Federal Register on September 25, 1991.**

FORM R DATA ELEMENTS REQUIRED UNDER PPA

- The quantity of the chemical prior to recycling, treatment or disposal entering any wastestream or released to the environment;
- e The quantities of the chemical recycled and treated at the facility and elsewhere;
- The quantity of the chemical released in one-time events not associated with production processes;
- Information on source reduction activities and the methods used to identify those activities; and
- A production ratio or activity Index.

ADDITIONAL DATA ELEMENTS PROPOSED BY EPA

- **Changes In accounting practices, estimation methods, or other factors;**
- **Indication if on-site recycling equipment or capacity was added during the reporting year;**
- **RCRA hazardous wastes affected by source reduction activities;**
- **Other TRI chemicals affected by source reduction activities; and**

e **For the 1992 reporting year, the addition of more detailed information about on-site treatment and recycling (e.g., wastestreams affected, recycling methods, amount recycled with each method).**

Changes in reporting amounts treated

Amounts treated on-site or sent off-site for treatment must now include amounts incinerated for heat and energy recovery.

In prior years, such amounts were not required to be reported.

Separate codes have been assigned to use as fuel activities so that they can be distinguished from thermal treatment and destruction activities.

OVERVIEW

- **Pollution Prevention Act: Eight New Data Elements**
- **Interpretation: EPA proposed rule and technical guidance**
- **New Form Rs**
- **Regulatory Trends on 313 Reporting**
- **Legislative Trends**
- **Enforcement**

EPCRA Section 313 Reporting Requirements

- ✓ Standard Industrial Classification (SIC) Codes 20 to 39**
and
- ✓ Manufacture, import, or process in excess of 25,000 lbs
of a listed toxic chemical .**
- or
- Otherwise use in excess of 10,000 lbs of a listed chemical**
and
- ✓ Ten or more employees or the equivalent.**

EIGHT NEW DATA ELEMENTS

ON FORMS R TO BE

SUBMITTED BY JULY 1, 1992

COVERING REPORTABLE

RELEASES FROM JANUARY 1991

TO DECEMBER 1991

(1) The quantity of the chemical entering any waste stream (or otherwise released into the environment) prior to recycling, treatment, or disposal during the calendar year for which the report is filed and the percentage change from the previous year.

(2) The amount of the chemical from the facility which is recycled (at the facility or elsewhere) during the calendar year, the percentage change from the previous year, and the process of recycling used.

(3) Source reduction practices used with respect to the chemical during the year at the facility.

(4) The amount expected to be reported under (1) and (2) for the following two calendar years as a percentage of the amount reported for the current year.

(5) A ratio of production in the production year to production in the previous year.

(6) Techniques, such as employee recommendations, external and internal audits, participative team management and material balance audits, which were used to identify source reduction opportunities.

(7) The amount of any toxic chemical released into the environment which resulted from a catastrophic event, remedial action, or other one-time event, and is not associated with production processes during the reporting year.

(8) The amount of the chemical from the facility treated (at the facility or elsewhere) during the calendar year and the previous year.

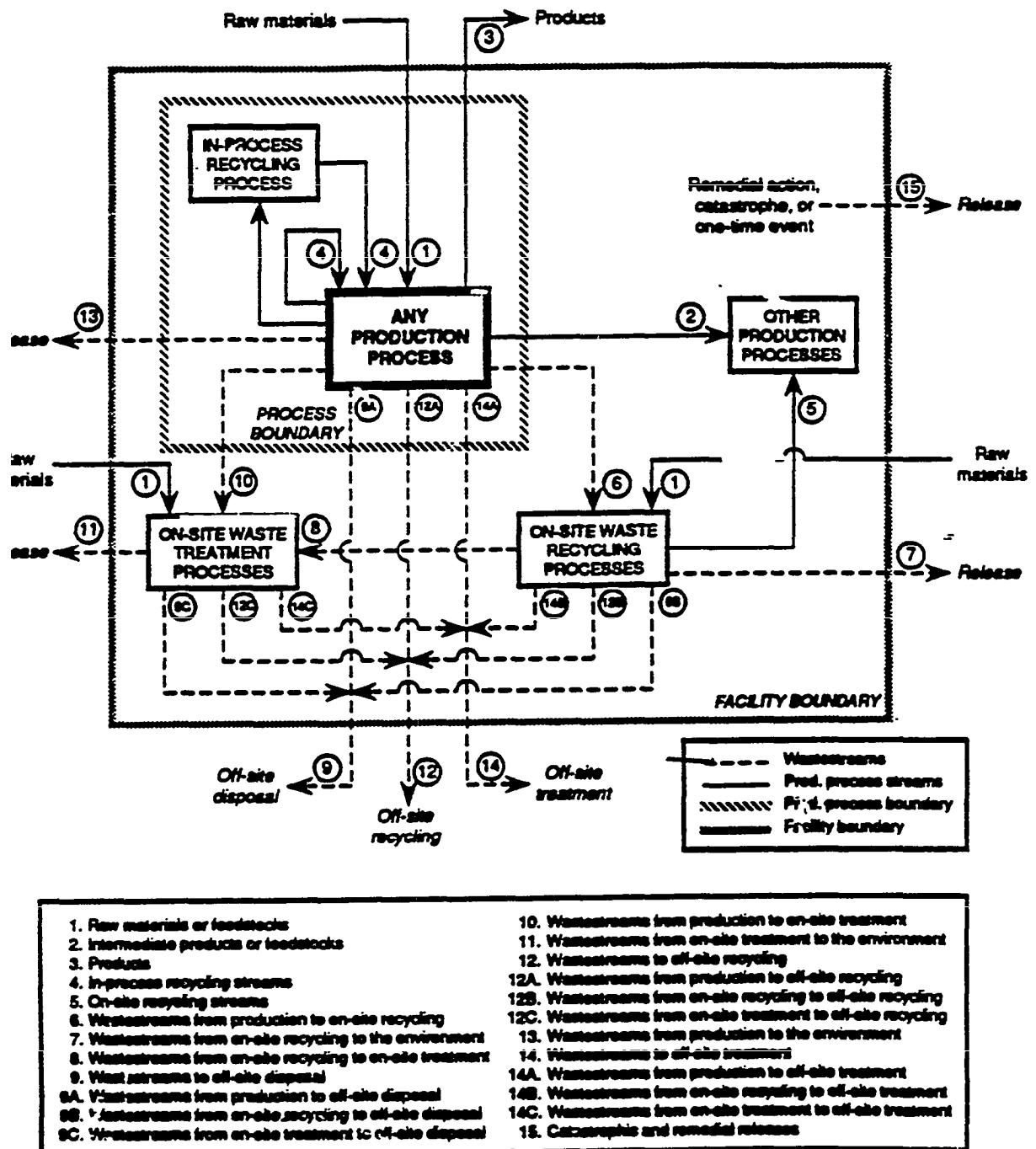


Figure 3-2. Schematic Diagram of Generic Manufacturing Processes.



United States
Environmental Protection
Agency

EPA FORM R

PART II. CHEMICAL-SPECIFIC INFORMATION (CONTINUED)

TRI FACILITY ID NUMBER

Chemical Category or General Name

SECTION 8. SOURCE REDUCTION AND RECYCLING ACTIVITIES

	A. Reporting Year (pounds/year)	B. Prior Year (pounds/year)	C. Following Year (pounds/year)	D. Second Year (pounds/year)	E. Process (enter code)
8.1 Quantity prior to recycling, treatment, or disposal entering wastes or released to the environment					
8.2 Quantity recycled on-site					
8.3 Quantity sent off-site for recycling					
8.4 Quantity entering treatment on-site					
8.5 Quantity sent off-site for treatment					
8.6 Quantity released to the environment as a result of remedial actions, catastrophic events, or one-time events not associated with production processes (pounds/year)					
8.7 Changes in accounting practices, estimation methods, or other factors (Check one box)				YES <input type="checkbox"/> NO <input type="checkbox"/>	
8.8 Did you add on-site recycling equipment or capacity in the reporting year? (Check one box)				YES <input type="checkbox"/> NO <input type="checkbox"/>	
8.9 Production Ratio or Activity Index					
8.10 Did your facility implement any new source reduction activity for this chemical in the reporting year? (Check one box)				YES <input type="checkbox"/> NO <input type="checkbox"/>	Answer questions 8.11-8.15. Skip questions 8.11-8.15. Go to question 8.16.



United States
Environmental Protection
Agency

EPA FORM R

PART II. CHEMICAL-SPECIFIC INFORMATION (CONTINUED)

TRI FACILITY ID NUMBER
Chemical Category or Generic Name

SECTION 8. SOURCE REDUCTION AND RECYCLING ACTIVITIES (CONTINUED)

8.11	Enter codes that represent the source reduction activities you implemented during the reporting year. Enter one or more codes to indicate as many methods used to identify activities as apply.						
	Source Reduction Activities (enter codes)	Methods to Identify Activity (enter codes)					
8.11.1	a.	b.	c.	d.	e.	f.	
8.11.2	a.	b.	c.	d.	e.	f.	
8.11.3	a.	b.	c.	d.	e.	f.	
8.11.4	a.	b.	c.	d.	e.	f.	
8.11.5	a.	b.	c.	d.	e.	f.	
8.11.6	a.	b.	c.	d.	e.	f.	
8.11.7	a.	b.	c.	d.	e.	f.	
8.12.1	Total quantity that would have entered wastes without source reduction activity (pounds/year)						
8.12.2	Calculation Method (enter code)						
8.13	Quantity prevented due to source reduction (pounds/year)						
8.14	RCRA hazardous wastes affected (enter RCRA waste code)	a.	b.	c.	d.	e.	
8.15	Other TRI chemicals affected (enter CAS Number or category code)	a.	b.	c.	d.	e.	
8.16	Is additional information on source reduction, recycling, or pollution control activities included with this report? (Check one box)					YES <input type="checkbox"/>	NO <input type="checkbox"/>

TRENDS IN SECTION 313 REPORTING

- **EXPANDING LIST OF SIC CODES**
- **EXPANDING LIST OF CHEMICALS**
- **USING ALTERNATIVE THRESHOLDS FOR MORE SIMPLIFIED REPORTING**

OTHER CHEMICAL LISTS UNDER REVIEW

- RCRA Section 261.33(e) & (f), Appendix VIII
- CAAA Sections 112(b) & (r), 112(r), 602(a) & (b)
- FIFRA Special Review, Canceled/Denied or Suspended, Restricted use
- CLEAN WATER ACT priority Pollutants
- SAFE DRINKING WATER ACT Toxicants
- EPCRA SECTION 302
- CERCLA RQ's OF 1, 10, 100
- CARCINOGENS Identified by IARC, NTP, AND EPA
- CALIFORNIA Drinking Water and Reproductive/Developmental Toxicants

LEGISLATIVE TRENDS
RIGHT-TO-KNOW MORE

**Lautenberg/
Durenburger
(not introduced)**

Adds 300 chemicals
from List of Lists

**Sikorski
H.R. 2880**

Adds 600 chemicals
from List of Lists

**Peak Release
Reporting**

ALL SIC Codes

Toxics Use Reduction Goals and Plans

Materials Accounting

PASSAGE POSSIBLE AS ADD-ON TO RCRA REAUTHORIZATION IN 1992

ENFORCEMENT FOR FAILURE TO REPORT

Section 325

**Up to \$25,000 per day
civil penalty for
failure to report**

**In the Matter of
Rainbow Paint and Coatings, Inc.**
**(EPA ALJ) (Aug. 8, 1991) (\$10,000 penalty
for failure to submit Form R)**

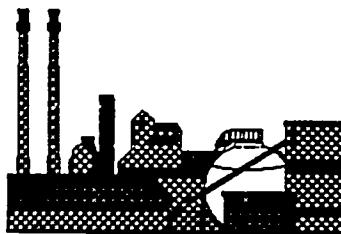
In the Matter of Moore Business Forms
**(EPA ALJ) (July 1, 1991) (\$2.2 million penalty
for failure to submit TSCA § 8(e) reports,
violation of SARA §§ 304, 311, 312 and 313)**

Section 326

**Citizen's suit
provision**

Penalties similar to Section 325

**Atlantic States Legal
Foundation, Inc. v. Whiting
Roll-Up Door Mfg. Corp.**
**(W.D.N.Y. Sept. 3, 1991)
(Motion to dismiss by defendant
denied in citizen's suit brought
under SARA § 326)**



ENVIRONMENTAL NEWSLETTER

"SPECIAL EDITION"

Collier, Shannon & Scott
3050 K Street, N.W., Suite 400, Washington, DC 20007

"Pollution prevention," "recycling," "source reduction," and "waste minimization," are rapidly replacing more traditional concepts of "command and control" and "end-of-pipe" treatment as the focus of future environmental regulation. Both Congress and EPA intend to shift the emphasis in environmental compliance and enforcement matters to reduce the amount of hazardous waste that is generated or disposed. This policy shift will profoundly affect the way America does business. In a "Special Edition" of the Collier, Shannon & Scott Environmental Newsletter we explore some of the regulatory and legislative programs that EPA and Congress have initiated to implement the pollution prevention concept.

The Newsletter opens with an in-depth look at the Pollution Prevention Act of 1990 and EPA's response to the mandates of the Act. To its credit, EPA has not only responded with required programs under the Act, but has also offered industry incentives through participation in voluntary programs intended to reduce toxics at the source. Finally, the Newsletter looks at recent legislative developments that are building on the momentum of the pollution prevention, recycling and waste minimization concepts.

Pollution Prevention Act of 1990

Enacted in the "11th hour" of the 101st Congress, the Pollution Prevention Act (PPA or the Act) (Pub. L. No. 101-58, Nov. 5, 1990) establishes the following four-tier

hierarchy of "waste minimization" plans:

- (1) pollution should be prevented or reduced at the source, whenever feasible;
- (2) pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible;
- (3) pollution that cannot be prevented or recycled should be treated in an environmentally safe manner, when feasible; and
- (4) disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.

EPA has already begun to fulfill the legislative mandates of the Act. Some of the PPA's data collection provisions will be implemented through section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA). Facilities subject to these reporting requirements must begin to comply this calendar year with new reporting requirements on information relating to a facility's source reduction and recycling activities. For all releases from January 1, 1991, to December 31, 1991, facilities must now include the following eight new data elements on Forms R to be submitted by July 1, 1992.

- (1) the quantity of the chemical entering any waste stream (or otherwise released into the environment) prior to recycling, treatment, or disposal during the

calendar year for which the report is filed and the percentage change from the previous year;

- (2) the amount of the chemical from the facility which is recycled (at the facility or elsewhere) during the calendar year, the percentage change from the previous year, and the process of recycling used;
- (3) source reduction practices used with respect to the chemical during the year at the facility;
- (4) the amount expected to be reported under (1) and (2) for the following two calendar years as a percentage of the amount reported for the current year;

- (5) a ratio of production in the production year to production in the previous year;
- (6) techniques, such as employee recommendations, external and internal audits, participative team

(continued on page 2)

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management and material balance audits, which were used to identify source reduction opportunities;

(7) the amount of any toxic chemical released into the environment which resulted from a catastrophic event remedial action, or other one-time event and is not associated with production processes during the reporting year and

(8) the amount of the chemical from the facility treated (at the facility or elsewhere) during the calendar year and the percentage change from the previous year.

A proposed rule adding these specific data reporting elements to the Toxic Chemical Release Inventory (TRI) reporting requirements was published by EPA on September 25, 1991. (56 Fed. Reg. 48475.) Along with the proposed rule, EPA also released draft guidance designed to assist facilities in meeting the new Pollution Prevention Act requirements. Comments are due to EPA on the proposed rule on November 12, 1991.

In addition to the data collection provisions, the Act also requires EPA to establish a pollution prevention office and to adopt a pollution prevention strategy. EPA met its first goal last winter when it formally created a new pollution prevention office within the Office of Policy and Planning. Through this office, now headed by Gerald Kotas, EPA will implement its source reduction strategies by (1) establishing standard methods of measurement of source reduction; (2) ensuring that the Agency considers the cross media effect of its regulations on source reduction (3) developing improved data collection and access; and (4) providing matching grants to States for programs to promote source reduction make specific technical assistance available to businesses, and provide training in source reduction techniques. The Office of Pollution Prevention may be moved in the near

future to the Office of Toxic substances.

To implement its programs, EPA has established a source reduction clearinghouse with a computer data base containing information on management technical, and operational approaches to source reduction. The clearinghouse will serve as a center for source reduction technology transfer, allow EPA to mount acute outreach and education programs and collect and compile information reported by States receiving grants. A

* * *

EPA Issues Pollution Prevention Strategy

On February 26, 1991 EPA issued its long term pollution prevention strategy which sets out EPA's blueprint for a *new policy* direction aimed at reducing pollution at the source rather than at the "end-of-the-pipe." (56 Fed Reg. 7849.) The Comprehensive National Pollution Prevention Strategy serves two purposes: (1) to provide guidance and direction for EPA Headquarters and Regional offices to incorporate pollution prevention into the Agency's existing regulatory and non-regulatory programs; and (2) to set forth a voluntary program to reduce emissions of 17 targeted chemicals through pollution prevention and source reduction.

To achieve these objectives EPA is investigating several activities, including among other things:

- "Regulatory clusters" - EPA will analyze future regulations for all environmental media affecting specific chemicals and industries and provide advance notice to the affected parties of the cumulative impact and long-term costs associated with compliance. This strategy is intended to foster early investment in prevention options to avoid the costs of constructing and

operating treatment faci

• Use of source reduction alternatives during perm negotiations or renewals will work with industrie identify and use pollutio prevention alternatives t achieve permitting requirements rather than traditional treatment or disposal technologies.

• Innovative use of pollutio prevention techniques in enforcement actions. Thr future settlement agree EPA hopes to induce companies which have transgressed regulatory requirements to undertal pollution prevention aud and other waste minimiz techniques. Firms willing incorporate such conditio into a proposed settleme agreement stand a good chance of mitigating pen for non-compliance.

Active use of enforcement t' to promote the goals of the PP. began with the publication of tw enforcement policy documents February 1991. EPA's Policy on Use of Supplemental Enforcer Projects in EPA Settlements (February 12, 1991) and Interim Policy on the Inclusion of Polluti Prevention and Recycling Provisi in Enforcement Settlements (Feb. 1991) apply to both civil and cri violations of environmental statu and are intended to encourage Agency enforcement personnel make innovative use of source reduction or recycling practices c systems. A

* * *

Industrial Toxics Project Initiated

The voluntary reduction prog also known as the Industrial To Project (ITP) or 33/50 program. second component of EPA's sweet pollution prevention strategy. Th

objective of the ITP is to encourage major industrial sources of pollution voluntarily to commit to reducing releases of 17 priority pollutants (see box for list of pollutants) to all environmental media through process changes, product reformulation, chemical substitution, changes in equipment, or in-process recycling. The ultimate goal of the ITP is to reduce the total national releases (to land, air and water) of the 17 toxic chemicals (from 1988 levels) by 33 percent by the end of 1992 and by 50 percent by the end of 1995. As an initial matter, EPA invited Chief Executive Officers of 600 companies identified in the Toxic Release Inventory as major emitters of one or more of the 17 targeted companies to commit their companies to the voluntary reduction goals. However, EPA will measure success according to whether the reductions have been achieved nationwide rather than for each company. EPA will assess progress in reaching this goal by comparing 1988 and 1995 data for the 17 priority pollutants in the Toxic Release Inventory. EPA required companies participating in the first round to commit in writing to reduce emissions of some or all of the 17 priority pollutants by a specific numerical percentage by May 15, 1991. EPA plans soon to expand the program from 600 to approximately 6,000 companies.

INDUSTRIAL TOXICS PROJECT 17 TARGET CHEMICALS	
Benzene	
Cadmium & Compounds	
Carbon Tetrachloride	
Chloroform	
Chromium & Compounds	
Cyanides	
Dichloromethane	
Lead & Compounds	
Mercury & Compounds	
Methyl Ethyl Ketone	
Methyl Isobutyl Ketone	
Nickel & Compounds	
Tetrachloroethylene	
Toluene	
1,1,1-Trichloroethane	
Trichloroethylene	
Xylenes	

While ostensibly "voluntary," companies that do not participate in the project will be readily identifiable and potentially open to criticism from local citizen or environmental groups. EPA claims that it will make participation in the voluntary programs attractive by providing public recognition of extraordinary efforts and by working with industry to identify barriers to source reduction. Companies making a good faith effort to implement innovative waste minimization practices will be given "credit" even if these companies fail to achieve emission reduction goals. In response to the ITP, 600 of the original companies have committed to the program. These companies were identified in a press release and EPA program status report on July 28 1991.

Thus far, the program has been received well by industry. But, the ITP has come under criticism for confusing many industries that are also expected to participate in EPA's early reduction program under the new Clean Air Act. EPA has met with the chief executive officers of many of the major companies participating in the ITP to hear their concerns and resolve any differences between the two programs.^A

* * *

Early Reduction Program

The Clean Air Act Amendments of 1990 (CAA) significantly changed and expanded the National Emission Standards for Hazardous Air Pollutants (NESHAPs) Program under section 112 of the Clean Air Act. The CAAA provides that companies that reduce toxic air emissions by 90 percent (95 percent for particulate emissions measured as PM-10), or enter into enforceable agreements to do so by the time the applicable Maximum Achievable Control Technology (MACT) standard is proposed can obtain a six-year extension from compliance with the technology-based emission standards.

EPA has proposed requirements and procedures for source owners and operators who seek alternative emission standards pursuant to this "early reduction program." [56 Fed. Reg. 27,338 (June 13, 1991).] The reductions will be measured from a "base" year, no earlier than calendar year 1987. The reduction must be achieved either (i) prior to proposal of an applicable emission standard; or (ii) prior to January 1, 1994, if the owner or operator of the source makes an enforceable commitment before the proposal of the applicable standard to achieve the reduction.

The proposed early reduction demonstration requires an owner or operator of a source to define and describe the "source" achieving the early reductions. The critical issue is the extent to which an owner or operator that can achieve emissions reductions at a specific operation or process must also demonstrate reductions from all other emissions units in a particular building or an entire facility. In order to allow flexibility, but also ensure significant reductions are achieved the proposed rule provides the owner or operator with specific alternatives regarding how different emissions points within the same building or facility can or must be grouped and considered a single source.

The owner or operator must then sum the estimated emissions of all hazardous air pollutants listed in section 112(b) of the Act that are emitted by the "source" in the "base" year and compare the total with a similar sum for emissions following implementation of reduction measures. This figure is used to calculate whether emissions have been reduced by the requisite percent (*i.e.*, 90 percent for air pollutants and 95 percent for PM-10). EPA proposes to "limit offsetting reductions in emissions of hazardous air pollutants known as "high-risk" chemicals. The proposed regulation contains a list of 35 "high-risk" chemicals with weighing factors based upon toxicity or estimates of the carcinogenic potency. The effect of these weighing factors is that sources would have to reduce

emissions of the 35 listed "high-risk" chemicals even further than 90 percent to qualify for the early reduction credit.

Reductions made under the ITP may be used by facilities that participate in the early reduction program. Like the ITP, EPA encourages early reduction through adoption of pollution prevention measures. Companies opting for voluntary reductions under the ITP, however, will not necessarily achieve the six-year MACT extension afforded under the early reduction program.^A

RCRA Waste Minimization

Although pollution prevention programs have received heightened emphasis over the past years, the concept is not new in environmental legislation. Since 1984, hazardous waste generators have been required under Section 3005(h) of the Resource Conservation and Recovery Act (RCRA) to certify at least annually that they have a program in place to reduce the volume or quantity and toxicity of waste to the degree determined by the generator to be economically practicable. In addition, generators are required to certify that the proposed method of treatment, storage, or disposal minimized the present and future threat to human health and the environment. Section 3002(b) of RCRA requires generators to certify the same information on hazardous waste manifests for shipping hazardous waste to treatment storage and disposal facilities.

While these RCRA requirements are mandatory, the absence of implementing regulations defining terms such as "economically practicable" has rendered the requirement more of a paper exercise.

In a recent development under RCRA, EPA has begun to incorporate waste minimization concepts into its land disposal

restriction (LDR) program by selecting Best Demonstrated Available Technology (BDAT) standards for certain waste streams based upon a recovery of metals in high temperature furnaces rather than allowing the continued chemical stabilization and disposal of those wastes on the land. (56 Fed. Reg. 24,443-46S (May 30, 1991).)^A

* * *

LEGISLATIVE ACTIVITIES

Legislation Introducing Pollution Prevention into RCRA

Just as the 1984 amendments to RCRA added mandatory requirements for certifying waste minimization so do the most recent legislative initiatives introduced in Congress build on the Pollution Prevention Act by establishing source reduction, recycling and pollution prevention requirement plans with which industry must comply.

On April 25, 1991 senator Max Baucus (D-MT) introduced a RCRA reauthorization bill, S. 976, which would require EPA to adopt goals for elimination or reduction of hazardous substances in processes, products and wastes. S. 976 adopts the four-pronged general Policy of the Pollution Prevention Act, namely emphasis, in descending order, on: (1) reduced use of toxic substances; (2) recycling; (3) waste treatment; and (4) waste incineration or disposal.

"Toxic use and source reduction plans" required by the bill would establish two and five-year numerical goals to reduce toxics. Companies could be cited for failing to comply with the requirements of the plans. The bill adopts more stringent conditions for facilities required to file Form Rs under section 313 of the Community Right-to-Know law by requiring extensive time-weighted pollution prevention goals and plans. While this provision is similar to the new reporting requirements under section 313, the requirements apply

not only to wastes but to all "hazardous substances," as defined CERCLA or other federal environmental laws on a site-specific basis. Congress also directs EPA to establish regulations on minimum content requirements for recycled materials and minimum recovery for products or product groups containing paper, glass, metals or plastics based on best available technology and management practices.

One outgrowth of the source reduction on initiatives at the State level is the emphasis on elimination of toxics from packaging materials. S. 976 requires that an Advisory Board submit to Congress within 18 months of enactment a report on minimizing toxic constituents in packaging. The recommendations must address national labeling and packaging standards; however, EPA is not required to adopt regulations based on the report. =

While a RCRA reauthorization vehicle has not been introduced in the House of Representatives, the House Energy Committee's **hazardous materials subcommittee** has conducted hearings on recycling and other pollution prevention mechanisms. Several Representatives have introduced separate recycling legislation. The subcommittee has heard testimony from federal, state and local government officials, industry -trade association representatives and environmental groups that supports measures that will go beyond those contained in the Baucus bill. Some of the recycling measures that these groups support include

- price preference for recycled goods;
- minimum content standards for recycled products such as newspaper, glass, plastics;
- a tax or fee system on products affecting their disposal costs;
- a national beverage container deposit/return program;

a national surcharge on products produced with virgin materials and

increased source separation and collection requirements in commercial and residual sectors to ensure availability of the supply of recyclable materials.

Other bills have been introduced promoting the recycling of used oil rubber tires, lead acid batteries and beverage containers, among others.

The most comprehensive recycling bill offered to date was recently introduced by Rep. Cordiss Collins (D-IL). The "National Recycling Markets Act of 1991" (H.R. 2746) incorporates several of the recycling measures that have garnered support on the Hill, including content standards for products manufactured with recycled materials and an all out ban on the interstate shipping of those products not containing the required materials.

Although reauthorization of a **comprehensive RCRA bill is unlikely** this year, considerable enthusiasm exists for recycling legislation. Therefore, Rep. Collins is moving her

bill on an independent track hoping for passage this year. A

* * *

Clean Water Act

The Clean Water Act (CWA), last amended in 1987, has not been a focal point for pollution prevention interests; however, the momentum generated by the Pollution Prevention Act and recent recycling legislation has sparked interest in several issues likely to be debated as part of the CWA reauthorization. While there are no specific pollution prevention measures contained in the Senate bill S. 1081, or being considered by the House which has yet to produce a bill, testimony from EPA and environmental groups has encouraged pollution prevention measures as an alternative to proposed legislative language establishing or strengthening "end-of-pipe" controls.

Recently, EPA Administrator William Reilly testified before the senate subcommittee on the environment that EPA hopes to reduce the need for additional costly and inefficient "end-of-pipe" controls by encouraging cost-effective prevention and source reduction

measures Reilly stated that while the Administration had no specific prevention provisions in mind for the CWA, he hoped that programs like the Industrial Toxics Project would reduce or eliminate the need for additional controls on toxic pollutants. In addition, Reilly testified that EPA will begin using geographic targeting, a concept that utilizes cross-media pollution prevention and pollution control technology to abate pollution in specific geographical areas. By way of example, Reilly pointed to the Great Lakes Basin Initiative which pioneered an integrated air, soil and water pollution control strategy to the problems of States in the Great Lakes region.

Because no pollution prevention measures have been proposed during the hearings on CWA reauthorization before Congress, it appears that all the pollution prevention talk in this legislation is nothing more than that. However, with RCRA apparently on hold until next year, the CWA may get increased attention and with the momentum pollution prevention and recycling are gaining on the Hill, it is likely that pollution prevention measures may be added to a CWA reauthorization. A

Environmental Newsletter

Reports prepared by:

Collier, Shannon & Scott, 3050 K Street, N.W., Suite 400, Washington, D.C. 20007

This newsletter summarizes many recent regulatory, legislative and litigation related activities in the environmental field. Some of the items described are regulatory proposals for which comment may be appropriate, others are final rules for which compliance plans should be developed. Summaries and analyses of the more important rules and legislation have been prepared and are available upon request.

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IX DEVELOPING ENVIRONMENTAL ISSUES FOR SHIPYARDS RESOURCE CONSERVATION AND RECOVERY ACT REAUTHORIZATION

Andrea B. Wenderoth

I. Senate Bill S.976 -- Introduced by Senator Max Baucus (D-MT)

A. status

1. Marked up on April 29, 1992.
2. Amendments regulating industrial nonhazardous waste and hazardous waste recycling likely to be introduced at full committee.

B. Provisions that May Affect Shipyards

1. Legislation focuses primarily on regulation of municipal solid waste and solid waste recycling.
2. Used Oil Regulation
 - (i) Used oil not listed as a hazardous waste.
 - (ii) Focuses primarily on development of management standards.

II. House Bill H.R 3865- Introduced by Representative Al Swift (D-WA)

A. status

Expected to be marked up by the full Committee in mid-May.

B. Provisions that May Affect Shipyards

1. Legislation focuses primarily on regulation of municipal solid waste and solid waste recycling.

2. Used Oil Regulation

- (i) Used oil not deemed a hazardous waste unless EPA fails to promulgate regulations for the management of used oil within 15 months of enactment of RCRA reauthorization legislation.
- (ii) Focuses on management standards.

III. Federal Facilities Compliance Act -- S.596 and H.R 2194

A **Overview** of S. 596 and H.R. 2194, which would amend RCRA to clarify provisions concerning the application of waste management requirements to federal facilities.

B. status of Bills

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MEMORANDUM

May 1, 1992

TO: NATIONAL SHIPBUILDING RESEARCH PROGRAM

FROM: JOHN L WITTENBORN
ANDREA B. WENDEROTH

RE: REGULATORY REFORMS PROPOSED BY EPA

On February 10, 1992, Don Clay, the Assistant Administrator of the Environmental Protection Agency ("EPA" or "the Agency"), proposed several reforms to the current regulatory system under the Resource Conservation and Recovery Act ("RCRA") the Superfund program, and the Underground Storage Tank program. These reforms were proposed in response to President Bush's announcement of a 90-day review of regulations. EPA's goal in conducting the reform is to protect human health and the environment in a manner that reflects the risks posed, eliminates unnecessary burdens and duplication% stimulates technology developments, and maximizes market incentives. This memorandum outlines the first phase of the reforms in these areas.

I. RCRA REFORM INITIATIVE

Many perceive the RCRA program as redundancy, burdensome, and overly broad. In an effort to address, these problems, EPA has proposed a comprehensive set of

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regulatory changes designed to decrease the regulatory reach of RCRA and make the statute's prevention and cleanup programs more cost-effective and risk-oriented. EPA estimates that reforms in this area would provide savings to states, local governments and industry in excess of \$ 1 billion annually.

A. Targets Only Wastes that Present Significant Risks

EPA is proposing to establish a system that regulates high risk Waste activities and excludes low risk activities through the adoption of concentration-based exemption levels that will replace the "mixture" and "derived-from" rules. These levels will reflect the risks posed by the hazardous waste or constituent. Any waste below the concentration level will be exempt from regulation under RCRA. For high risk wastes that warrant regulation, EPA is proposing to undertake four rulemakings to create management standards that are tailored to specific industry practices and that promote recycling. EPA predicts that the following industries will receive the greatest benefit from this proposal: metal recovery industries, building and related industries using cement materials, recyclers that store incoming materials prior to processing and collectors of common or universal wastes, such as fluorescent bulbs and ni-cad batteries.

B. Easing the Economic Burden of Corrective Action Cleanups

In recognition of the enormous economic burden associated with corrective action cleanup costs EPA is proposing significant changes to the corrective action cleanup program. EPA's most prominent reform involves distinguishing between cleanup associated with "old" wastes and cleanups associated with ongoing industrial operations. EPA has proposed several changes regarding cleanups of old wastes, including allowing such wastes to be temporarily stored and treated without violating the land disposa

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restriction standards ("LDRs"), allowing Stabilization on site, and finalizing special treatment standards for cleanups involving contaminated soil and debris.

c. streamlining the Permitting Process

EPA recognizes that the current RCRA permitting system is costly and overly broad. Consequently, the Agency is proposing several measures to ease the financial burdens and to streamline the processing of permits for low-risk facilities. Such measures include granting class-permits for low-technology units (**e.g., filtration, dewatering**), eliminating mandatory post-closure permits developing a class permit system for Research Development and Design ("RD&D") and experimental facilities, and establishing a risk-based system of class permitting for storage prior to recycling.

II. **SUPERFUND PROGRAM REFORM**

The complexity and cleanup delays of the current Superfund program have given rise to widespread public criticism. To address the problems posed by the current system EPA has proposed a new Superfund Accelerated Cleanup Model which will seek to streamline the cleanup process and reduce to less than five years the time it takes to perform short-term cleanups.

Currently, Superfund cleanup actions are grouped into two discrete programs - "remedial" actions and "removal" actions. "Remedial" actions address long-term cleanup sites on the National Priorities List ("NPL"), while "removal" activities address short term "emergency" situations. The Superfund Accelerated Cleanup Model would eliminate the current distinction between "remedial" and "removal" actions and thus, initially treat all actions the same.

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One of the biggest problems in the current system identified by EPA is the redundancy of many of the assessments that are conducted prior to initiation of the cleanup. For example, sites are evaluated under the removal program (e.g., removal assessments), the site assessment program (e.g., site investigations, expanded site investigations, Hazard Ranking System scoring), and the remedial program (e.g., baseline risk assessments, feasibility studies). In addition, assessments may also be performed by state, local and private parties. Many of these assessments are performed independently of each other and information and data are not shared. To eliminate or reduce this redundancy, EPA proposes to combine many of the assessments.

After an assessment is performed a Regional Decision Team would assess which course of action to take and place the site on an Early Action list and/or score long term restoration actions, such as ground water sites, for inclusion on the Long Term Remediation List. Cleanup at sites placed on the Early Action List would focus on substantially reducing or eliminating threats to public health and the environment within a specified short timeframe. See attachment A for a schematic of EPA's proposed Superfund program structure.

III. UNDERGROUND STORAGE TANK REFORM

To assist municipalities and other small businesses in complying with cost effective underground storage tank ("UST") requirements, EPA will grant municipalities flexibility to choose from a variety of methods to meet the Agency's financial assurance requirements and allow states the flexibility to extend regulatory compliance deadlines for small businesses. EPA will also issue a directive that provides examples of how

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streamline UST cleanups and will provide legal protection to banks that loan money for tank cleanups.

IV. **MISCELLANEOUS REFORMS**

A. Innovative Technology

To eliminate the existing impediments to innovative technology, EPA will reduce insurance requirements and speed the processing of research and development permits. EPA will also exempt testing on bioremediation technologies from RD&D permitting requirements and Will allow federal agencies to transfer new technologies to the market place more quickly.

B. Enforcement .

To minimize the costly involvement of municipalities and small waste contributors in Superfund litigation, EPA will pursue increased use of mediation and alternative dispute resolution. In addition, the Agency will encourage companies to use innovative technologies or permanent remedies when addressing violations by granting companies complete releases from Superfund or RCRA liability.

V. **CONCLUSION**

EPA's proposed reforms would significantly benefit the steel making industry. In particular, adoption of the concentration-based exemption criteria would eliminate the unnecessary regulation of many low-risk wastes, thereby providing steel companies with significant regulatory compliance savings. Permitting reforms would also produce cost and time savings.

The Assistant Administrator will be meeting with the Administrator to discuss these reforms and hopefully set forth a strategy for their implementation Adoption of

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many of the reforms seems likely as they have received broad-based support from EF personnel.

If you have any questions, please contact us.



Environmental News

FOR RELEASE : FRIDAY, MAY 1, 1992

EPA PROPOSES ALTERNATIVES FOR EXCLUDING LOW-RISK WASTES FROM STRINGENT CONTROLS

Robin Woods 202-260-4377

The U.S. Environmental Protection Agency today proposed a new Hazardous Waste Identification Rule, which outlines two alternative approaches that allow some wastes posing no or little risk to public health and the environment to be exempt from stringent federal hazardous waste controls. The rule is EPA's first major step in implementing the agency's hazardous waste reform initiative under the Resource Conservation and Recovery Act (RCRA).

One approach would retain the current system for identifying hazardous wastes, but would specify how low-risk wastes could qualify for an exemption. Exemptions would be allowed when hazardous constituents were below a certain level.

A second approach would change the way hazardous wastes are currently identified. All wastes would enter and exit the hazardous waste regulatory system based upon the level of contaminants found in the waste.

Both approaches would modify two rules that capture low-risk wastes, the so-called mixture and derived-from rules. Under the current mixture and derived-from rules, nearly all wastes mixed with regulated hazardous wastes or wastes derived-from a hazardous waste are subject to full hazardous waste controls, regardless of the degree of risk they present.

"When final, this rule will remove low-risk wastes from RCRA and target the program on the most significant risks to health and the environment," said EPA Administrator William K. Reilly. "It is one way EPA can improve the cost-effectiveness of our programs without sacrificing environmental quality."

(more)

R-91

"We want public input on these options," Reilly added. "They both are consistent with where RCRA needs to go generally."

Hazardous wastes are subject to very stringent federal controls. EPA and *most* outside groups have conceded, however, that under some circumstances the federal rules may be too broad, capturing wastes posing little or no risk and Subjecting them unnecessarily to comprehensive and expensive controls.

On Dec. 6, 1991, the U.S. Court of Appeals invalidated these rules solely on procedural grounds. On Feb. 18, 1992, EPA reinstated the two rules, while committing to consider modifications to accommodate low-risk wastes.

Currently, wastes are identified if they appear on EPA's list of hazardous wastes or if they meet certain "characteristics," i.e., toxicity, corrosivity, reactivity, and ignitability. EPA has identified 39 toxic constituents of concern which are used to identify the substance as a hazardous waste. EPA also specifically lists waste Streams from individual sources.

The first approach in today's proposal would set regulatory threshold levels *to exempt* wastes under the current system. The levels would be tested using currently used methods. Three options are being considered for setting these levels: health-based exemption levels; technology-based concentration levels; or a combination of the two. Dilution would not be allowed as a means of reaching the exemption level.

Generators wishing to take advantage of this exemption would have to test their wastes and submit a notification and certification to EPA providing specific information on the waste and waste management practices.

The second approach would expand the characteristics for a number of additional substances. *Over the* next few years, this could exempt up to 200 or *more* additional constituents that are low-risk. The expansion of the characteristics would serve as the sole means for identifying hazardous wastes.

Under this approach, whether or not a particular waste is added to or dropped from regulatory controls would depend entirely *on the levels* triggering inclusion into the system. In today's proposal, EPA is asking for comment on how best to establish the triggering levels.

In addition, EPA is also requesting comment on whether, in defining hazardous waste, the rule should take into considerate on the way the waste is managed.

Both proposals contain a wide range of options for exempting low-risk waste from the hazardous waste regulatory system. Based on preliminary estimates, both approaches have the potential to exempt millions of tons of low-risk wastes. The second approach, involving a new identification system, could also bring in some unknown volumes of hazardous wastes.

EPA is providing a 60-day public comment period. For more information, the general public can call EPA's waste hotline at 800-424-9346, or 703-920-9810, in the Washington, D.C., area.

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[COMMITTEE PRINT]

APRIL 2, 1992

[Showing H.R. 3865 as reported with an amendment in the nature of a substitute by the Subcommittee on Transportation and Hazardous Materials on March 26, 1992]

102D CONGRESS
2D SESSION

H. R. 3865

To amend the Solid Waste Disposal Act to authorize appropriations for fiscal years 1993 through 1998, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 22, 1991

Mr. SWIFT introduced the following bill, which was referred to the Committee on Energy and commerce

A BILL

To amend the Solid Waste Disposal Act to authorize appropriations for fiscal years 1993 through 1998, and for other purposes.

- 1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

8 SEC. 804. USED OIL MANAGEMENT.

9 (a) MANAGEMENT OF USED OIL-Section 3014 is
10 amended to read as follows:

11 "SEC. 3014. MANAGEMENT OF USED OIL

“(a) IN GENERAL.—Not later than 15 months after the enactment of the National Waste Reduction, Recycling, and Management Act, the Administrator shall promulgate such regulations under this section applicable to the management of used oil as may be necessary to protect human health and the environment and to encourage the recycling of used oil, consistent with protection of human health and the environment. Such regulations shall take effect on the date 3 months after promulgation. If regulations are not promulgated by the Administrator under this section within such 15-month period, the provisions of this section shall not apply to the management of used oil, and used oil shall be regulated in the same manner as liquid hazardous waste listed under section 3001.

1 "(b) GENERATORS.—

2 "(1) IN GENERAL.—The regulations under this
3 subsection shall contain requirements applicable to
4 persons generating used oil, including persons col-
5 lecting, storing, or accumulating used oil. In Promul-
6 gating such regulations, the Administrator shall take
7 into account the effect of such regulations on small
8 businesses (as defined by the Administrator). Such
9 regulations shall not apply to the generation of used
10 oil, or to the collection storage, or accumulation of
11 used oil, by any individual who removes such oil
12 from the engine of a motor vehicle, household appli-
13 ance, or item of domestic equipment if such vehicle,
14 appliance or equipment is owned or operated by such
15 individual and used only for personal purposes. Any
16 person to whom regulations under this subsection
17 are applicable shall be referred to in this section as
18 a 'used oil generator'.

19 "(2) STORAGE.—The regulations under this
20 section shall require used oil generators to comply
21 with each of the following:

22 "(A) UNDERGROUND Tanks.— No used Oil
23 may be stored in an underground tank unless
24 such tank meets the requirements of section
25 9003.

1 "(B) TIME LIMIT.-No used oil may be
2 stored for more than 12 months before being
3 transferred as required by paragraph (3).

4 "(C) Above-GROUND Tanks.-The stor-
5 age of used oil in above-ground tanks shall be
6 subject to a Spill Prevention and Counter-
7 measure Control Plan which complies with the
8 Federal Water Pollution Control Act (33 U.S.C.
9 1251 et seq.). Such tanks shall be labeled as
10 containing used oil, shall be subject to overflow
11 ixnd freeboard control, and shall be inspected
12 daily by the tank owner or operator. The owner
13 or operator of any above-ground tank used for
14 used oil storage shall notify the Administrator
15 of releases of used oil into the environment
16 from such tank. The owner or operator of any
17 above-ground tank used for used oil storage
18 shall clean up all releases of used oil from any
19 suoh tank into the environment. The owner or
20 operator of any above-ground tank used for
21 used oil storage shall comply with closure re-
22 quirements established by the Administrator.

23 "(D) CONTAINERS.-All containers in
24 which used oil is stored shall be in good *condi-*
25 *tion, properly handled, labeled as containing*

1 used oil, in compliance with any packaging
2 standards applicable under regulations adopted
3 by the Secretary of Transportation for used oil
4 containers, and inspected for leakage on a
5 weekly basis. The owner of any container in
6 which used oil is stored shall notify the Admin-
7 istrator of releases of used oil into the environ-
8 ment from such container. The owner used oil
9 container shall clean up releases of used oil into
10 the environment from the container and shall
11 comply with such requirements as shall be es-
12 tablished by the Administrator regarding the
13 disposal of containers used for the storage of
14 used oil.

15 “(3) TRANSFER,-The regulations under this
16 section applicable to used oil generators shall require
17 that a used oil generator may transfer used oil only
18 to one of the following:

19 “(A) A used oil recycling facility with a
20 class permit under subsection (d) of this sec-
21 tion.

22 “(B) A facility with a permit under section
23 3005.

1 “(C) A used oil transporter obligated by
2 contract to deliver the used oil to any facility
3 referred to in subparagraph(A), (B), or (C).

4 “(4) RECORDKEEPING.- The regulations under
5 this section applicable to used oil generators shall re-
6 quire a used oil generator to maintain, for a period
7 of at least 3 years, both of the following-

8 “(A) A copy of any agreements between
9 the used oil generator and persons to whom
10 used oil is transferred by the used oil generator.

11 “(B) A record of each transfer of used oil
12 containing each of the following:

13 “(i) The date and quantity of used oil
14 transferred.

15 “(ii) The name and address of the
16 person to whom the used oil is transferred,
17 a signed receipt from such person verifying
18 the quantity of used oil received, and the
19 EPA identification number of such person
20 if such person is a transporter subject to
21 subsection (c).

22 For each shipment of used oil transferred to a trans-
23 porter or to a facility referred to in paragraph (3),
24 the generator shall provide to the transporter or to
25 the owner or operator of such facility a certification

1 that, to the generator's knowledge, the used oil has
2 not been mixed with any quantity of a listed hazard-
3 ous waste in violation of subsection (e)(2). The regu-
4 lations under this paragraph shall not apply to Used
5 oil which is transferred, together with a manifest
6 which complies with section 3002, to a person regu-
7 lated under section 3003 or to a facility permitted
8 under section 3005.

9 “(c) TRANSPORTERS.—

10 “(1) IN GENERAL.- The regulations under this
11 subsection shall contain requirement applicable to
12 the transportation of used Oil. Any person subject to
13 regulation under this Subsection Shall be referred to
14 in this section as a ‘used oil transporter’.

15 “(2) STORAGE.-The regulations referred to in
16 paragraph (1) shall provide for the temporary stor-
17 age of used oil by used oil transporters prior to
18 transfer to a facility described in subsection (b)(3).
19 Used oil storage by such persons shall comply with
20 the same requirements as are applicable under sub-
21 section (b) (2) to used oil generators, except that
22 such storage may not be for a period in excess of 30
23 days before being transferred as required in sub-
24 section (b)(3).

1 “(3) TRANSFER.-The regulations under this
2 section shall require that each used oil transporter
3 may transfer used oil only to one of the following

4 “(A) A used oil recycling facility with a
5 class permit under subsection (d) of this sec-
6 tion.

7 “(B) A facility with a permit under section
8 3005.

9 “(4) RECORDKEEPING.-The regulations under
10 this section shall require used oil transporter to
11 maintain, for a period of at least 3 years, both of
12 the following—

13 “(A) A copy of any agreements between
14 the used oil transporter and persons to whom
15 used oil is transported.

16 “(B) A record of each shipment of used oil
17 containing each of the following:

18 “(i) The date and quantity of used oil
19 transported.

20 “(ii) The name and address of the
21 person to whom the used oil is transported
22 and a signed receipt from such person veri-
23 fying the quantity of used oil received, to-
24 gether with a certification provided by such
25 person certifying that the facility to which

1 the oil was transferred is a facility referred
2 to in paragraph (3).

3 “(iii) The location of any intermediate
4 storage of the used oil.

5 “(iv) A certification by the generator
6 that, to the generator's knowledge, the
7 used oil has not been mixed with any
8 quantity of a listed hazardous waste in vio-
9 lation of subsection (e)(2).

10 “(v) A certification signed by the
11 transporter that, to the transporter's
12 knowledge, used oil in the shipment has
13 not been mixed with any quantity of a list-
14 ed hazardous waste in violation of sub-
15 section (e)(2).

16 The regulations under this paragraph shall not apply
17 to used oil which is transferred, together with a
18 manifest which complies with section 3004, to a fa-
19 cility permitted under section 3005.

20 “(5) SHIPPING REQUIREMENTS.-The regula-
21 tions referred to in paragraph (1) shall require com-
22 pliance by persons transporting used oil with all re-
23 quirements applicable, under rules promulgated by
24 the secretary of Transportation, to the shipping of

1 used oil, including requirements relating to packag-
2 ing, labeling, placarding, and marking.

3 **(6) FINANCIAL RESPONSIBILITY.**—The regula-
4 tions referred to in paragraph (1) shall require com-
5 pliance by persons transporting used oil with the ap-
6 plicable financial responsibility requirements of the
7 Hazardous Materials Transportation Act (49 U.S.C.
8 App. 1801 et seq.) and regulations under that Act.

9 **(7) IDENTIFICATION NUMBERS.**—The regula-
10 tions under this section shall require that each used
11 oil transporter shall have an identification number
12 provided by the Administrator.

13 **(d) RECYCLERS.**—

14 **(1) IN GENERAL.**—The regulations under this
15 subsection shall contain requirements applicable to
16 persons who process, re-refine, reclaim, or otherwise
17 beneficially reuse used oil, including persons who use
18 used oil as a fuel. Any person subject to regulation
19 under this subsection shall be referred to in this sec-
20 tion as a ‘used oil recycler’. As used in this section
21 the term ‘used oil recycling facility’ means a facility
22 at which such processing, re-refining, reclaiming, or
23 other beneficial reuse takes place. Used oil *generated*
24 by petroleum refining or production facilities which
25 is to be refined or processed along with normal proc-

1 ess streams at a petroleum refining facility shall not
2 be required to comply with the provisions of this sec-
3 tion (other than subsection (e)(1) (relating to storage
4 in surface impoundments) or with any other provi-
5 sions of this subtitle unless such used oil is not in-
6 serted into the refining process or pipeline.

7 “(2) STORAGE.—The regulations under this
8 subsection shall require used oil recyclers to comply
9 with each of the following storage requirements:

10 “(A) UNDERGROUND TANKS.—No used oil
11 may be stored in an underground tank unless
12 **such tank** meets the requirements of section
13 **9003**.

14 “(B) ABOVE-GROUND TANKS.-
15 (i) The
16 **storage of** used oil in an above-ground tank
17 shall be subject to a Spill Prevention and Coun-
18 termeasure Control Plan which complies with
19 the Federal Water Pollution Control Act (33
20 U.S.C. 1251 et seq.), and all releases of used
21 oil into the environment from an above-ground
22 tank shall be subject to corrective action. Such
23 regulations shall also require that the Adminis-
24 trator be notified of releases of used oil into the
25 environment. The storage of used oil in above-
ground tanks shall comply with all standards

1 specifically applicable under this subtitle to the
2 storage of hazardous TV* in tanks at facilities
3 with a final permit under section 3005, except
4 as provided in "clause (ii).

5 "(ii) Secondary containment at facilities
6 which refine crude oil into petroleum products
7 classified as an S.I.C. number 2911 under the
8 Office of Management and Budget Standard
9 Classification Manual and facilities which
10 compound or blend lubricating base oil into fin-
11 ished lubricant byproducts as their principal ac-
12 tivity classified as SIC number 2899 or 2992
13 under such Manual, shall be governed by the
14 requirements of a Spill Prevention and Counter-
15 measure Control Plan which complies with the
16 Federal Water Pollution Control Act (33 U.S.C.
17 1251 et seq.) and shall not be governed by sec-
18 tion 3005 unless the Administrator determines
19 that compliance by such facilities with second-
20 ary containment standards applicable to facili-
21 ties with final permits under section 3005 is
22 necessary for the protection of human health
23 and the environment.

24 "(c) CONTAINERS.-The storage of used
25 oil in containers shall comply with all standards

1 specifically applicable under this subtitle to the
2 use and management of containers for the stor-
3 age of hazardous waste at facilities required to
4 have a final permit under section 3005. In addi-
5 tion, such containers shall comply with labeling
6 requirements which shall be established by the
7 Administrator.

8 “(3) RECORDKEEPING.—The regulations under
9 this subsection shall require each used oil recycler to
10 maintain at the used oil recycling facility, for a pe-
11 riod of at least 3 years, each of the following—

12 “(A) Records of all used oil which is recy-
13 cled at the facility and the manner in which
14 such used oil was recycled. Such records at a
15 minimum shall include each of the following,
16 with respect to each shipment of used Oil-

17 “(i) The date and amount of oil re-
18 ceived.

19 “(ii) The name and address of the
20 used oil generator and used oil transporter
21 from which the used oil came.

22 “(iii) A certification by the used oil
23 transporter that, to the transporter’s
24 knowledge, the used oil has not been mixed

1 with any hazardous waste in violation of
2 subsection (e)(2).

3 “(B) Records of releases, inspections, test-
4 ing, and monitoring as determined by the Ad-
5 ministrator to be necessary and appropriate.

6 “(4) CONTINGENCY PLANS.—The regulations
7 under this subsection shall require each used oil re-
8 cycler to prepare and maintain at the used oil recy-
9 cling facility a copy of a contingency plan for effec-
10 tive action to minimize unanticipated damage from
11 any release of used oil. Such regulations shall pro-
12 tide that contingency plans which are applicable to
13 a used oil recycler under other provisions of this
14 subtitle or under a Spill Prevention and Counter-
15 measure Control Plan which complies with the Fed-
16 eral Water Pollution Control Act (33 U.S.C. 1251 et
17 seq.) shall satisfy the requirement of this para-
18 graph.

19 “(5) MAINTENANCE AND OPERATION.-The
20 regulations under this subsection shall require each
21 used oil recycler to comply with such requirements
22 regarding maintenance and operation of used oil re-
23 cycling facilities, continuity of Operation, security,
24 safety, and training for personnel as may be nec-
25 essary.

1 “(6) CORRECTIVE ACTION.—The regulations
2 under this section shall provide for detecting releases
3 of used oil from units designated for used oil han-
4 dling at a used oil recycling facility and for taking
5 corrective action at the unit with respect to any such
6 release. Such regulation shall include a requirement
7 that the facility owner or operator notify the Admin-
8 istrator and other appropriate State and local au-
9 thorities (as designated by the Administrator) as
10 promptly as practicable following detection of any
11 release of used oil from a used oil unit at a used oil
12 recycling facility.

13 “(7) TESTING.—The regulations under this
14 subsection shall require used oil recyclers to test, at
15 the time of receipt, all used oil received by a used
16 oil recycling facility for levels of metals, total
17 halogens, PCBs, and such other materials as the Ad-
18 ministrator considers appropriate. The regulations
19 also shall require that all fuel produced from the re-
20 cycling process be tested (for levels of the materials
21 tested for upon receipt) before departure from the
22 facility. The regulations shall specify the test method
23 and levels for used oil received and the test method
24 and levels for fuel produced. The regulations shall

1 prohibit the mixing of used oil with any other sub-
2 stance prior to testing.

3 “(8) CONTAMINATED USED OIL.—The regula-
4 tions under this subsection shall require a used oil
5 recycler to provide for the separate storage of any
6 used oil which is found to be contaminated with any
7 hazardous waste for a period not to exceed 90 days
8 following receipt thereof and for the transfer, within
9 such 90-day period, of such contaminated used oil to
10 a facility for which a final permit is in effect under
11 section 3005. Any used oil which contains 1,000
12 ppm or more total halogens shall be presumed to be
13 contaminated with hazardous waste for purposes of
14 this paragraph.

15 “(9) FINANCIAL RESPONSIBILITY.—The regula-
16 tions under this subsection shall require compliance
17 by each used oil recycler with the same financial re-
18 quirements as are applicable to facilities required to
19 obtain a final permit under section 3005 for the
20 treatment, storage, or disposal of hazardous Waste.

21 “(10) CLASS PERMITS.—

22 “(A) IN GENERAL.-The regulations under
23 this subsection shall establish a system of class
24 permits for used oil recycling facilities and shall
25 require all used oil recyclers to obtain such a

1 permit for each such facility unless the facility
2 obtains a permit under section 3005.

3 “(B) APPLICATION FORM.—The regula.
4 tions referred to in subparagraph (A) shall in-
5 clude a standard application form that—

6 “(i) informs an applicant of all re~
7 quirements with which the applicant must
8 comply; and

9 “(ii) requires an applicant to affirm,
10 under penalty of perjury and applicable
11 provisions of section 3008, that the facility
12 complies with the requirement of this sec-
13 tion and that the representations made in
14 the application are accurate and complete.

15 “(C) APPLICATION.-The regulations re-
16 ferred to in subparagraph (A) shall require that
17 the completed application form be submitted by
18 the applicant to the Administrator together
19 with each of the following—

20 “(i) A copy of the contingency plan
21 required by paragraph (4).

22 “(ii) A copy of any closure plan re-
23 quired as provided in paragraph (2)(B).

1 “(iii) A COPY of documents assuring
2 compliance with the financial responsibility
3 requirements of paragraph (9)”

4 “(D) PERMIT ISSUANCE.-Promptly after
5 receiving an application for a class permit
6 under this paragraph, the Administrator shall
7 make such application available for public com-
8 ment. Not later than 60 days after receipt of a
9 completed application for such a class permit,
10 the Administrator shall certify that the form is
11 complete. Upon the Administrator’s issuance of
12 such certification, the applicant shall deemed to
13 be issued a class permit. If the Administrator
14 does not so certify within such period or deter-
15 mine within such period that the requirements
16 of the permit have not been satisified, at the ex-
17 piration of such period, the applicant shall be
18 deemed to be issued a class permit under this
19 Paragraph.

20 “(E) VERIFICATION.-Not later than 1
21 year after an applicant is issued a class permit
22 under this subsection the Administrator shall
23 verify that the information contained in the per-
24 mit application form is accurate. Such ver-
25 ification may be carried out through means

1 such as periodic on-site *inspections*, *SUPPOrting*
2 documentation, and independent audits.

3 “(F) INSPECTIONS.—Each year the Ad-
4 ministrator shall conduct an inspection of the
5 facility to determine if the facility is in compli-
6 ance with this section.

7 “(G) RELATIONSHIP TO SECTION 3005 PER
8 MITS.—Nothing in this subsection shall be con-
9 strued to limit the Administrator’s authority to
10 require any individual facility to obtain an indi-
11 vidual permit under section 3005 if the Admin-
12 istrator deems such a permit is necessary to
13 protect human health and the environment.

14 “(H) EXISTING LAND-BASED FACILI-
15 TIES.—The regulations under this section shall
16 provide that no used oil recycling facility which
17 is in operation as of the enactment of the Na-
18 tional Waste Reduction, Recycling and Man-
19 agement Act shall be eligible to apply for a
20 class permit under this subsection if—

21 “(i) such used oil recycling facility uti-
22 lizes or has utilized any pit, pond, lagoon,
23 or other surface impoundment for contain-
24 ing used oil, and

1 “(ii) there has been a release from
2 such pit, pond, lagoon, or other surface im-
3 poundment which requires corrective action
4 or which is otherwise subject to post clo-
5 sure care requirements.

6 Any such used oil recycling facility shall be re-
7 quired to comply with subsection (f).

“(e) GENERAL PROHIBITIONS.—

9 “(1) SURFACE IMPOUNDMENTS.—Effective on
10 the date of the enactment of the National Waste Re-
11 duction, Recycling, and Management Act, no used
12 oil may be placed (for storage, disposal, or for any
13 other purpose) by any person in any pit, pond, la-
14 goon, or other surface impoundment or in any un-
15 covered tank.

16 “(2) PROHIBITION ON MIXING.—Effective on
17 the date of the enactment of the National Waste Re-
18 duction, Recycling, and Management Act, no person
19 shall mix oil with any hazardous.

20 “(3) PROHIBITION ON USE AS DUST SUPPRES-
21 SANT—Effective on the date of the enactment of the
22 National Waste Reduction, Recycling, and Manage-
23 ment Act, no person may use any used oil as a dust
24 suppressant.

25 "(f) CLOSURE OF EXISTING SURFACE UNITS.—

1 “(1) IN GENERAL.-Not later than 15 months
2 after the enactment of the National waste Reduc-
3 tion, Recycling, and Management Act, the Adminis-
4 trator shall promulgate rules under this subsection
5 requiring the closure of all existing pits, ponds, la-
6 goons, and other surface impoundments and uCOV-
7 ered tanks containing used oil. Such regulations
8 shall require such corrective action and shall estab-
9 lish such closure and post closure standards as may
10 be necessary to protect human health and the envi-
11 ronment.

12 “(2) RELEASES.-The regulations referred to in
13 this subsection shall require the owner or operator
14 of any used oil recycling facility at which there is lo-
15 cated a pit, pond, lagoon, or other surface impound-
16 ment from which there is a release which requires
17 corrective action or post closure care to obtain and
18 comply with a permit under section 3005.

19 “(g) Disposal OF Used OIL.—Any used oil which
20 is disposed of shall be subject to regulation under the pro-
21 visions of this subtitle other than this section which govern
22 the disposal of a listed or identified hazardous waste.

23 “(h) OFF-SPECIFICATION FUEL.—

24 “(1) ALLOWABLE LEVELS FOR LEAD AND
25 TOTAL HALOGENS.—For purposes of regulations of

1 the Administrator governing the burning of used oil
2 for energy recovery, any used oil which exceeds a
3 specification level of 10 ppm maximum for lead or
4 a specification level of 1,000 ppm maximum for total
5 halogens shall be considered an off-specification fuel.
6 L-seal oil may not be diluted or blended with any
7 other substance for purposes of compliance with
8 such specification levels. Nothing in this subsection
9 shall be construed to affect the specification levels
10 established by the Administrator for contaminants
11 other than lead or total halogens for the purposes of
12 determining if any used oil is an off-specification
13 fuel.

14 “(2) STANDARDS FOR BURNING OFF-SPEC USED
15 OIL.—Within 3 years after the enactment of the Na-
16 tional Waste Reduction, Recycling, and Management
17 Act, the Administrator shall promulgate such emis-
18 sion standards for facilities burning off-specification
19 used oil fuel for energy recovery as maybe necessary
20 to protect human health and the environment. Un-
21 less such standards are in effect on the date 3 years
22 after the enactment of such Act, or unless standards
23 for such emissions are in effect on such date under
24 section 112 of the Clean Air Act, it shall be unlawful

1 for any person to burn off-specification used oil fuel
2 for energy recovery.

3 **“(i) USED OIL MANAGEMENT FUND.—**

4 **“(1) FEE.-**The regulations promulgated by the
5 Administrator under this section shall include provi-
6 sions imposing a fee on the retail sales of oil for
7 automotive use. The fee shall be in the amount of
8 \$0.05 per quart of oil sold at retail. The regulations
9 shall include provisions respecting the imposition
10 and collection of such fee by the Administrator.

11 **“(2) STATE CREDIT.—**T he a m o u n t o f a n y
12 qualified State fee paid by any person SUbject to the
13 fee under this subsection shall be reedited against
14 the fee imposed under paragraph (l). A State fee
15 shall be qualified for purposes of this paragraph if
16 such fee is imposed by a State on the retail sale of
17 oil for automotive use and if the revenues from such
18 fee are used by the State for purposes of administer-
19 ing used oil collection programs and for public edu-
20 cation regarding matters addressed in subsection (j).

21 **“(3) USE OF FEE PROCEEDS.-**The proceeds of
22 any fees, penalties, and interest collected by the Ad-
23 ministrator under this subsection shall be deposited
24 in a special fund in the United States Treasury
25 which shall thereafter be available for appropriation

1 to remain available until expended, subject to appro-
2 priation, for making grants to States to administer
3 used oil collection programs which are based on the
4 guidelines published under subsection (k) and for
5 public education regarding matters addressed in sub-
6 section (j). Grants shall be apportioned in each fiscal
7 year to each State based on the Administrator's esti-
8 mates of the ratio of the fee proceeds from each
9 State in that fiscal year to the total of fee proceeds
10 for all States in that fiscal year. The Administrator
11 may adjust such amounts in subsequent fiscal years
12 to reflect actual proceeds.

13 "(j) USED OIL RECYCLING EDUCATION.—(1) Within
14 24 months after the date of the enactment of the National
15 Waste Reduction, Recycling, and Management Act, the
16 Administrator shall develop and implement education ac-
17 tivities and programs to inform the public and small busi-
18 nesses about the environmental and safety hazards associ-
19 ated with improper handling and disposal of used oil, in-
20 cluding mixing used oil with hazardous waste, and the
21 benefits derived from legitimate used oil recycling. In car-
22 rying out his responsibilities under this subsection, the Ad-
23 ministrator shall consult with and assist the heads of Fed-
24 eral departments, agencies and bureaus, appropriate State
25 and local government agencies, educational institutions,

1 trade associations, and other representatives of private
2 sector organizations.

3 "(2) There is authorized to be appropriated to the
4 Administrator not more than \$150,000 for fiscal year
5 1993 and not more than \$175,000 for each of the fiscal
6 years 1994 and 1995 to carry out the purposes and re-
7 quirements of this subsection,

8 "(k) USED OIL COLLECTION PROGRAMS.— Within
9 24 months after the date of the enactment of the National
10 Waste Reduction Recycling, and Management Act, the
11 **Administrator** shall publish guidelines to assist State and
12 local governments and other public service organizations
13 in the development and operation of used oil collection pro-
14 grams.

15 "(1) ENFORCEMENT.-The Administrator may use
16 the authorities of sections 3007, 3008, and 3013 to en-
17 force the requirements of this section in the same manner
18 as such provisions are used to enforce the requirements
19 of this subtitle generally applicable to hazardous waste.

20 "(m) RELATIONSHIP TO OTHER LAW-Nothing in
21 this section shall prohibit any State or political subdivision
22 thereof from imposing any requirement regarding used oil
23 which is more stringent than any requirement established
24 by this section.".

1 **(b)** TABLE OF CONTENT AMENDMENT.-The item
2 relating to section 3014 in table of contents for subtitle
3 C (contained in section 1001) is amended to read as fol-
4 lows:

“Sec. 3014 Management of used oil.”.

5 SEC. 805 TECHNICAL AMENDMENTS

6 Section 7002(b)(2)(B) is amended—

7 (1). in clause (i) by striking out the comma at
8 the end and inserting in lieu thereof a semicolon;
9 and

10 (2) in clause (iv) by striking out “980” and in-
11 serting in lieu thereof “1980”.

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- 70 -

1 consistent with Federal storm water regulations;

2 '(v) Odor control;

3 '(vi) Collection and proper disposal of

4 residuals from the facility;

5 '(vii) Facility capacity to handle projected

6 incoming volumes of municipal solid waste:

7 '(viii) Closure; and

8 "(ix) Corrective Action.

9 "(c) Regulations promulgated pursuant to

10 ~~aph (A)(i) shall also require that, to the~~

11

12 ~~separated prior to entering the facility, and that at least 85% by weight of the total amount of organic municipal waste entering a compost facility be used in producing compost or mulch in accordance with the regulations required in paragraph (l).".~~

13

14

15

16

17 ~~01~~ **SEC. 410. MANAGEMENT STANDARDS FOR USED OIL.**

18 (a) Section 3014 of the Solid Waste Disposal Act is amended
19 to read as follows:

20 "MANAGEMENT STANDARDS FOR USED OIL"

21 "(a) In General.- (1) Not later than eighteen months after
22 the date of the enactment of the Resource Conservation and
23 Recovery Act Amendments of 1992, the Administrator shall
24 promulgate regulations, in accordance with this section, for
25 persons who collect, store, transport, process or recycle used
26 oil. Used oil that is (A) collected, stored, transported and (B)

1 either processed or recycled in accordance with such regulations
2 is not a hazardous waste. Used oil that is not managed in
3 accordance with such regulations or is disposed, ~~shall be managed~~

4 ~~a hazardous waste~~ ~~and disposed of in facilities which~~

5 ~~caused persons~~

6 (2) such regulations shall include standardized forms
7 developed by the Administrator for the recordkeeping
8 requirements described in subsections (b)(4), (c)(5), (d)(2)
9 and (e)(2). shall require that such forms be used by Persons
10 who collect, store, transport, process or recycle used oil
11 for carrying out applicable recordkeeping requirements.

12 "(3) The Administrator shall conduct an analysis of the
13 economic impact of the regulations required under this
14 subsection on the used oil recycling and processing
15 industries. The Administrator shall ensure that such
16 regulations encourage and expand reliance on appropriate
17 methods of recycling and processing used oil, consistent
18 with protection of human health and the environment.

19 '(b) Collectors. -

20 "(1) In general. -The Administrator shall promulgate
21 regulations establishing requirements for collectors of used
22 oil as necessary to protect human health and the
23 environment. Such regulations shall include at a *minimum* the
24 requirements set out in this subsection, and other such
25 requirements as the Administrator considers necessary. For
26 purposes of this section, the term 'collector' means a

1 ~~commercial~~ entity that collects, stores, accumulates, or
2 otherwise generates used oil. Such term does not include
3 the removal of used oil by an individual from the engine of
4 a light-duty motor vehicle, household appliance, or domestic
5 equipment owned or operated by such individual.

6 "(2) Storage. -The regulations shall require the
7 following with respect to storage of used oil:

8 (A) No used oil may be stored in an underground
9 tank unless such tank meets the requirement of section
10 9003.

11 ~~(B)~~ No used oil may be stored for more than

12 (B) No used oil may be stored in any container, tank, or
13 surface impoundment unless such container, tank or surface
14 impoundment meets the requirements of section 3004

15 (C) Notwithstanding paragraph (1), collectors shall not
16 be required to obtain a permit pursuant to section 3005 ~~applicable to~~
17 of this Act.

18 (D) Transfer. -The regulations shall require that a collector transfer used oil to one of the following:

19 (I) a used oil processing facility with a permit

20 (II) a used oil recycling facility with a permit

21 (III) a used oil disposal facility with a permit

22 under section 3005; or

Contain
tanks
and su
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waste

1 "(D) a used oil transposer with a contract to
2 deliver the used oil to any facility in subparagraph
3 (A), (B), or (C).

4 '(4) Recordkeeping.--The regulations shall require that
5 a collector of used oil shall keep records, for a period of
6 at least three years, containing the following information
7 regarding each transfer of used oil:

8 " (A) the date and amount of used oil transferred;
9 " (B) the destination of the used oil transferred;
10 " (c) a certification from either the transporter
11 of the used oil, or from the recycling processing, or
12 disposal facility to which the used oil is being
13 transferred, that such facility has a permit as
14 required under this section ~~as required by this section~~
15 under this section; and

16 "(D) a certification by the collector that, to the
17 collector's knowledge, the used oil **has** not been mixed
18 with any quantity of hazardous waste.

19 '(5) Within 24 months after the date of enactment of
20 the Resource Conservation and Recovery Act Amendments of
21 1992, each collector shall notify the state **or** local agency
22 or department designated pursuant to section 9002(b)(1) **of**
23 this Act, specifying the collector's name, location of
24 operation, method of collection ~~and~~ storage capacity.

25 "(6) Spill Prevention.--The regulations must
26 proper management practices to minimize spills and to
 establish

*and a certification signed by the collector
attesting that the conditions of this section
specified in paragraph (6) of this section
have been met.*

1 protect human health and the environment. Such regulations
2 shall require contingency plans for effective action to
3 minimize unanticipated damage from any spills.

4 "(c) Transporters.- (1) In general.-The Administrator shall
5 promulgate regulations establishing requirements for transporters
6 of used oil as necessary to protect human health and the .
7 environment. Such regulations shall include, at a minimum, the
8 requirements set out in this subsection and such other matters as
9 the Administrator considers necessary.

10 "(2) Storage.-The regulations shall prescribe
11 conditions under which intermediate storage of used oil at a
12 used oil transfer station, or at any other intermediate =
13 facility or location between a collector and the facilities
14 described in subsection (b)(3), may be allowed. Such
15 regulations shall specify, the maximum time allowed for such
16 storage, special recordkeeping requirements necessary to
17 protect human health and the environment with respect to
18 such storage, safeguards to assure that mixing with other
19 materials does not occur during such storage and such other
20 requirements as the Administrator considers necessary to o
21 protect human health and the environment. In no case shall
22 used oil be stored, except in accordance with section 3004
23 of this Act.

24 "(3) Identification number.-The regulations shall
25 require that each transporter acquire an identification
26 number from the Environmental Protection Agency.

1 "(4) Financial responsibility.-The regulations shall
2 require that each transporter meet the applicable financial
3 responsibility requirements of the Hazardous Materials
4 Transportation Act (49 U.S.C. App. 1801 et seq.) and
5 regulations under that Act.

6 "(5) Recordkeeping.-The regulations shall require that
7 a transporter of used oil shall keep records for a period
8 of not less than three **years** containing the following
9 information regarding each shipment of used oil:

10 "(A) the date and amount of used oil transported;

11 "(B) the destination of the used oil transported
12 and the location of any intermediate storage of the
13 used oil;

14 "(C) a certification from the recycling,
15 processing or disposal facility to which the used oil
16 is being transported that such facility **has** a permit as
17 **required under this section, as is exempt as provided**
under this section;

18 "(D) a certification by the collector that, to the
19 collector's knowledge the used oil has not been mixed
20 with any quantity of hazardous waste;

21 "(E) a certification by the transporter that, to
22 the transporter's knowledge, the used oil has not been
23 mixed with any quantity of hazardous waste; and

24 "(F) a certification from the recycling,
25 processing or disposal facility to which the used oil

1 is being transported that the facility actually
2 received the amount of used oil described in
3 subparagraph (A).

4 "(d) Recyclers and Processors-- (1) In General.--The
5 Administrator shall promulgate ~~and~~ **lations establishing**
6 requirements for recyclers ~~and~~ **processors of used oil as necessary** ✓
7 to protect human health and the environment. Such regulations
8 shall include at a minimum, the requirements set out in this
9 subsection and such other matters as the Administrator determines
10 are necessary.

11 '(2) Minimum Requirements. --The regulations shall
12 include requirements respecting the following:

13 "(A) maintenance of records of all used oil that
14 is recycled or processed. At a minimum, such records
15 shall contain, with respect to each shipment of used
16 oil, the date and amount of oil received, the names and
17 addresses of the collector, transporter, recycler or
18 processor, *if applicable*, of such oil, and, ~~and~~
19 certifications described in subparagraphs (C), (D), and
20 (E) of subsection (c)(5);

21 '(B) maintenance of records of spills,
22 inspections, testing and monitoring;

23 ● (C) recycling or processing of all used oil
24 received by the recycling or processing facility in
25 accordance with the requirements established by the
26 Administrator;

1 "(D) the design and construction of the recycling
2 or processing facility to prevent spills and protect
3 human health and the environment;

4 "(E) contingency Plans for effective action to
5 minimize unanticipated damage from any spills;

6 "(F) the maintenance and operation of such
7 recycling or processing facilities continuity of
8 operation, training for personnel, closure and
9 postclosure, and financial responsibility, as may be
10 necessary. Financial responsibility shall be based on
11 total storage capacity;

12 "(G) compliance with such requirements for
13 corrective action as may be necessary; and

14 "(H) prohibition on storage of used oil except in
15 accordance with section 3004 of this Act.

16 "(3) Testing. --(A) The regulations shall require
17 ~~recyclers or processors to test~~ ^{sue} used oil received for
18 ~~recycling or processing by a recycling or processing~~
19 facility for levels of metals, total halogens, and such
20 other materials as the Administrator considers appropriate
21 and all used oil fuel burned for energy recovery at a
22 facility prior to burning. The regulations shall specify
23 the test method or methods for used oil received and the
24 test methods and specifications for used oil fuel burned for
25 energy recovery. The testing shall determine whether any
26 used oil received by such facility has been mixed with a

Promulgated
by the Administrator
in accordance with

1 hazardous waste and whether any fuel recycled or processed
2 by such a facility meets the Environmental Protection
3 Agency specifications as amended by subsection (i) of the
4 Resource Conservation and Recovery Act Amendments of 1992.

5 '(B) Used oil received by the facility containing
6 more than 1000 ppm of total halogens is _____
7 a hazardous waste because it has been mixed with
8 halogenated hazardous waste listed or identified
9 pursuant to this Subtitle. Nothing in this subsection
10 shall be construed as affecting or impairing section
11 3004(q)(2)(B) of this Subtitle.

12 "(f) Permits.- Effective twenty-four months after the
13 date of enactment of the Resource Conservation and Recovery Act
14 Amendments of 1992, recycling or processing of used oil, except (e) or (K)
15 in accordance with a permit issued pursuant to section 3005, is
16 prohibited. The Administrator shall make full use of the
17 authority of section 3005(k).

18 "(2) During the period beginning on the date of the
19 enactment of the Resource Conservation and Recovery Act
20 Amendments of 1992 and ending twenty-four months after the
21 date of enactment of this Act, or until such time as the
22 regulations under section 3005(k) are promulgated and the
23 facility is determined to be eligible for such permit under
24 section 3005(k), whichever is sooner, the recycling or
25 processing of used oil, except in accordance with a permit
26 issued pursuant to section 3005, is prohibited.

For purposes of this subsection, the requirements of section 3005(c) applicable to hazardous waste treatment, storage and disposal facilities shall apply to owners or operators seeking a permit under section 3005(c) for used oil recycling and processing.

1 "(g) Regulatory Requirements if A Fails To Meet
2 Deadline. - **If the Administrator fails to promulgate regulations**
3 under this section within ~~one year~~ months after the date of
4 enactment of the Resource Conservation and Recovery Act
5 Amendments of 1992, the following requirements and prohibitions
6 shall become immediately effective:

7 "(1)' The operation of any used oil recycling or
8 processing facility that does not maintain a valid Spill
9 Prevention and Countermeasure Control Plan pursuant to the
10 Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.)
11 is prohibited.

12 "(2) The operation of any used oil recycling or
13 processing facility that stores or disposes of used oil in
14 any pit, pond, lagoon, uncovered tank, or other surface
15 **impoundment except in accordance with a permit issued**
16 **(c)** **pursuant to section 3005 is prohibited.**

17 "(3) The mixture of used oil with any hazardous waste
18 listed or identified under this subtitle, except where such
19 mixture is stored, treated, or disposed of at a facility
20 with a permit under section 3005, is prohibited.

21 "(4) Owners and operators of used oil recycling or
22 processing facilities shall comply with release reporting
23 and investigation regulations set forth at title 40, Code of
24 Federal Regulations, part 280, section 50 (July 1, 1990).

25 '(5) Owners and operators of used oil recycling or
26 processing facilities shall comply with applicable release

1 response and corrective action requirements set forth at
2 title 40, Code of Federal Regulations, part 280, section 60
3 (July 1, 1990).

4 **"(6) The Administrator shall conduct annual inspections.**

5 of each used oil recycling or processing facility to
6 **determine whether such facilities comply with** ~~the~~ ⁱⁿ
7 ~~requirements set forth at title 40, Code of Federal~~
8 ~~Regulations, subtitle E, part 280 (July 1, 1990)~~ ^{and this section} ~~and this~~
9 section and whether the operation of any such facility ~~on the date of~~
10 ~~presents an imminent and substantial risk to human health or~~ ^{source} ~~of the~~
11 the environment. Upon a determination that a facility ^{(Conservation}
12 presents an imminent and substantial risk to human health ^{Amendments}
13 and the environment, the Administrator shall take action to
14 abate such risk under section 7003

15 **"(7) The owner or operator** ~~of~~ ^{of} **used oil recycling** ^{of} ~~used oil recycling~~ ^{of} ~~used oil recycling~~ ¹⁹⁹²
16 or processing facility that produces used oil fuel shall
17 test each shipment of such fuel for lead, arsenic, cadmium,
18 chromium, zinc, polychlorinated biphenyls, total halogens,
19 and flashpoint. Records relating to such testing shall be
20 maintained by the owner or operator of such facility for not
21 less than three years and shall be made available to the
22 Administrator for inspection upon request.

23 **"(8) Each shipment of used oil,** ~~including used oil~~
24 ~~collected from persons generating used oil~~ shall be
25 accompanied by a receipt signed by the ~~transporter~~ ^{that}
26 shall contain the following information:

Person
transporting
such used oil

the

1 "(A) the quantity and place of origin of used oil
2 being shipped;

3 "(B) the name and address of the facility to which
4 the used oil is being shipped;

5 "(C) the name and address of the transporter; and

6 "(D) the date of shipment.

7 "(9) Any person who transports used oil shall comply
8 with all applicable requirements, including spill reporting,
9 placarding and insurance requirements of the Hazardous

10 Materials Transportation Act (41 U.S.C. APP. 1001 et seq.)

11 "(10) For each shipment of used oil, ~~the transporter~~
12 shall certify that, to the best of ~~his~~ knowledge, the used
13 oil has not been mixed with any hazardous waste listed or
14 identified under this subtitle.

15 Such requirements and prohibitions shall remain in effect for 10 years
16 purposes of implementing this section until such time as the
17 Administrator promulgates the regulations required under this
18 section.

19 "(11) Notification--Within 24 months after the date of
20 enactment of the Resource Conservation and Recovery Act
21 Amendments of 1992, each collector shall notify the state,
22 local agency, or department designated pursuant to section
23 9002(b)(1) of this Act, specifying the collector's name,
24 location of operation, method of collection, and storage
25 capacity.

26 "(h) Used Oil Recycling Education- (1) The Administrator shall

and a certification signed by the
Collector attesting that all applicable
standards and requirements of law
have been met.

1 ~~the Environmental Protection Agency~~ shall implement education
2 activities and programs to inform the public and small businesses
3 about the environmental and safety hazards associated with
4 improper handling and disposal of used oil, including mixing used
5 oil with hazardous waste, and the benefits derived from
6 ~~legitimate used oil recycling. In carrying ou~~ ^{or processing}
7 responsibilities under this subsection, the Administrator shall
8 consult with and assist the heads of Federal departments,
9 agencies and bureaus, appropriate State and local government
10 agencies, educational institutions, trade associations, and other
11 representatives of private sector organizations.

12 "(2) There is authorized to be appropriated to the
13 Administrator not more than \$175,000 for each of the fiscal
14 years 1992 and 1993 **to** carry out the purposes and
15 requirements of this subsection.".

16 "(i) Used Oil Fuel Specifications.- (1) Not later than 24
17 months after the date of enactment of the Resource Conservation
18 and Recovery Act Amendments of 1992, the Administrator shall
19 promulgate regulations revising the used oil specification
20 standards in effect on such date of enactment to establish--

21 '(A) industrial specification standards for fuel
22 derived from used oil that is to be burned in
23 industrial furnaces and boilers; and

24 "(B) specification standards for fuel derived from
25 **used** oil that is to be burned in nonindustrial furnaces
26 and boilers.

1 Such revised specification standards shall be adequate to protect
2 human health and the environment.

3 "(2) If the Administrator fails to promulgate the
4 regulations in accordance with paragraph (1), ~~any un-~~ ~~time as the Administrator promul~~ le,
5 ~~in fuel derived from used oil shall not exceed --~~ : ~~level~~
6 ~~10 parts per million for industrial furnaces or~~

7 and boilers; and

8 ' (B) 2 parts per million for non industrial
9 furnaces and boilers.

10 '(j) Definitions.- For purposes of this section--

11 **(1)** ~~the term~~ 'used oil' means any oil that has been
12 refined from crude oil, used, and, as a result of such use,..
13 is contaminated by physical or chemical properties. Used
14 oil mixed with a hazardous **waste** listed or identified under
15 this section shall not be considered 'used oil' for purposes
16 of this section.

17 **(2)** ~~the term~~ 'used oil processor' or 'processor' means
18 a person who processes used oil to produce or manufacture
19 usable materials or to recover energy.

20 **(3)** ~~the term~~ 'process' means to produce, recycle, "
21 manufacture used oil into useable materials with real
22 economic value or to burn used oil in industrial furnaces or
23 boilers for energy recovery (provided any used oil burned
24 meets that applicable used oil fuel specifications in effect
25 at the time the used oil is burned, at 40 CFR Part 266,

1 **Subpart E** July 1, 1990).

2 ~~(3)~~ the term 'recycle' means to process or re-refine
3 used oil to produce or manufacture usable materials,
4 including used oil re-refine into fuels other than fuels
5 burned in industrial furnaces or boilers for energy
6 recovery.

7 (b) The table of contents for subtitle C (contained in
8 section 1001) is amended by deleting after "3014" the phrase
9 "Restrictions on recycled oil" and inserting "Management
10 standards of used oil".

11 (c) Section 3005(e) of the Solid Waste Disposal Act is
12 amended by adding the following new paragraph:

13 -(4)(A) In the case of a used oil recycler or processor.
14 that is in existence on the date of enactment the Resource
15 Conservation and Recovery Act Amendments of 1992, and which
16 is subject to the requirement to have a permit, such
17 recycler or processor shall be deemed to have an interim
18 permit if the recycler or processor submits, not later than
19 60 days after the date of enactment of the Resource
20 Conservation and Recovery Act Amendment of 1992, to the .
21 Administrator or State with a program authorized under
22 section 3006, a notice that contains the following
23 information:

24 "(i) The name and address of the recycler or
25 processor and, if different, of the facility to be
26 regulated by the permit.

(ii) A brief description of the business conducted at the facility.

'(iii) The name, address, and telephone number of a contact person from whom the Environmental Protection Agency can obtain additional information.

'(iv) The date on which operation first began at the facility.

"(v) The amount of used oil and other solid waste or secondary material stored at the facility.

"(vi) The extent of financial responsibility maintained by the recycler or processor for the operations currently being conducted at the facility.

"(B) A recycler that begins operating after such date of enactment shall submit the notice described in paragraph (A) not later than sixty days after the date **in which the recycler begins operating.**

Section 3005 is further amended by adding the following

new subsection:

(k) Permit By Rule.- (1) Except as provided in para

(3) the Administrator may promulgate require~~ments~~ under

4 subsection (a) that provide ~~e~~ or more classes of facilities
25 that shall be ~~to have a permit for the~~ use of this

16 ~~ambitile~~ and to be operating in compliance with such a permit.

INSERT
85B

Insert 85 A

(d) Section 1004(36) of the Solid Waste Disposal Act is amended by adding the following new sentence at the end thereof:

"Such term shall include:

- (i) sorptive materials that are used to contain and control spills and, or, releases of used oil;
- (ii) oily rags;
- (iii) industrial wipers;
- (iv) empty containers; and
- (v) used oil filters

provided that such material has come into contact with used oil and that the free flowing used oil has been removed from such material. used oil mixed with a hazardous waste listed or identified under section 3001, shall not be considered used oil.

Insert 85 B

"(k) Permit by Rule.-- (1) Except as provided in paragraph (4), and unless the Administrator determines that an individual permit is not necessary to protect human health and the environment due to the characteristics of the material recycled or processed by such facility, the Administrator may issue a permit by rule to an owner or operator of a facility which processes or-recycles used oil in accordance With section 3014.

"(2) At a minimum, a permit by rule issued under this section shall demonstrate that the owner or operator is in compliance with --

"(A) all standards and requirements of law, including ground water monitoring, financial responsibility, corrective action, and design and operating standards, where applicable; and

"(B) any additional requirements deemed necessary by the Administrator to ensure the protection of human health and the environment.

"(3)(A) An owner or operator eligible for a permit by rule pursuant to this section *may* demonstrate compliance with paragraph (2)(A) of this subsection by submission of a certification signed by such owner or operator attesting that all standards and requirements of law are being met.

"(B) Any person who knowingly provides false information on such certification shall, upon conviction, be fined not more than \$25,000, or imprisoned for not more than one year, or both.

"(4) The Administrator may not issue a permit by rule to an owner or operator of a facility if--

"(A) such facility is -

"(i) disposing used oil; or

"(ii) using, reusing, reclaiming or recycling used oil in a manner constituting disposal; or

"(B) the Administrator determines that the owner or operator of an otherwise eligible facility -

"(i) has a history of compliance violations of this Act or other applicable environmental laws; or

"(ii) is storing, processing, reusing, reclaiming, recycling, or otherwise handling or managing used oil in a manner that may present an imminent or substantial endangerment to human health or the environment." .

INSERT 75b (cm)

1 (f) Section 3005(e)(1) of the Solid Waste Disposal Act is amended
2 by adding at the end thereof:

3 "This paragraph shall not apply to an owner or operator
4 of a cement kiln required to have a permit under this
5 section that did not burn hazardous waste in commercial
6 quantities as of February 21, 1991.";

7 (g) Section 3005(e) is amended by adding the following new
8 subparagraph:

9 "(4)(A) In the case of each cement kiln which burned
10 ~~hazardous as of February 21, 1991 and which is granted interim~~
11 ~~waste~~ status under this subsection, interim status shall terminate
12 unless the owner or operator of such facility applies for a
13 final determination regarding the issuance of a permit under
14 subsection (c) of this section for such facility within twelve
15 months after the date of enactment of the Resource
16 Conservation and Recovery Act Amendments of 1992, and conducts
17 a trial burn of such cement kiln within eighteen months of
18 such date.

19 "(B) Not later than the date three years after the date
20 of enactment of the Resource Conservation and Recovery Act
21 Amendments of 1992, in the case of each application for a
22 permit under this subsection for any cement kiln which was
23 submitted in accordance with the schedule set forth in the
24 preceeding subparagraph, the Administrator shall issue a final
25 permit pursuant to such application or issue a denial of such
26 application. The time periods specified in this subsection

INSERT 85b (con)

1 shall also apply in the case of any State which is
2 administering an authorized hazardous waste Program und
3 *section 3006 of this subchapter.";*
4
5

such facility is constructed and operated in compliance with the requirements of such regulations.

"(2) Regulations promulgated under this subsection shall require-

"(A) notification of the permitting authority and other interested persons by the owner or operator of the facility of the intent to construct or commence operations of such facility or unit prior to constructing or commencing operations;

"(B) monitoring

"(C) annual on-site inspections by the permitting authority; and

"(D) a demonstration by the owner or operator that the facility is in compliance with all applicable standards and requirements of law; and

"(E) such additional measures as the Administrator considers appropriate to ensure that such facilities are designed and operated in a manner that protects human health and the environment.

"(3) An owner or operator may not operate a facility under a permit by rule if-

"(A) such facility is -

"(i) incinerating hazardous waste or used oil;

"(ii) treating or disposing hazardous waste or used oil; or

1 "(iii) using, reusing, reclaiming or
2 recycling hazardous waste or used oil in a manner
3 constituting disposal; or
4 (B) the administrator determines that such owner
5 or operator -
6 "(i) has a history of compliance violations;
7 or
8 (ii) is storing, processing, reusing,
9 reclaiming, recycling, or otherwise handling or
10 managing hazardous waste or used oil in a manner
11 that may present an imminent or substantial
12 endangerment to health or the environment.
13 (4) Notwithstanding paragraph (3)(A)(ii), a facility
14 that is recycling secondary material may operate under a
15 permit by rule in accordance with this section.

16 SEC. 411. PERMITS FOR SOLID WASTE MANAGEMENT.

17 Subtitle D of the Solid Waste Disposal Act is amended by
18 adding at the end thereof the following new section:

19 "Permits for Solid Waste Management

20 "Sec. 4011. (a) Notification Requirement.- (1) Not later
21 than one year after the enactment of the Resource Conservation
22 and Recovery Act Amendments of 1992, any owner or operator of a

23 facility that stores (excluding transportation-related facilities
24 such as loading docks, parking areas, storage areas and other
25 similar areas where shipments of solid waste are held during the
26 normal course of transportation), treats, disposes, recycles or

An industrial
landfill, surf
impoundment,
application u
waste

USED OIL

- Federal Legislative and Regulatory "Gridlock" May Be Broken
- Regulatory Developments
 - EPA Under May 1, 1992 Court Deadline to Make Listing Determination
 - Agency Supplemental Proposal (September 1991)
 - Three Listing Options
 - Two Phase Management Standards for Generators, Transporters and Recyclers
 - Comments on Incentives for Do-It-Yourselfer Oil

USED OIL

- Used Oil Rule Affected by President's 90-Day "Freeze"
 - OMB Review Only Non-Discretionary Duty - That Is, Listing Determination
 - OMB Will Not Review Discretionary Duty - That Is, Used Oil Management Standards
 - Failure to Issue Both May Affect Legislation and Could Lead to Further Litigation
 - Industry Attempts to Reverse OMB's Directive

USED OIL

■ EPA Staff's Initial Recommendations

- No Listing for Recycled Used Oils; Listing for Disposed of Gasoline-Engine Oils
- Baseline Management Standards
- Study of Lead in Used Oil Burned as Fuel
- Study of Incentives for Do-It-Yourselfer Oil

USED OIL

- Final Rule at OMB
- Final Rule Elements

- No Listing for Recycled Used Oils; Disposed Used Oils Subject to Toxicity Characteristics
- No Management Standards; “Playing Field” Has Changed
- Codification of Exemption for Drained Used Oil Filters
- Further Study of Used Oil Residuals

USED OIL

■ Legislative Developments

- RCRA Bill (H.R. 3865) Reported from House Subcommittee on March 26, 1992
 - No Explicit "No Listing" Mandate; Used Oil Listed if EPA Does Not Issue Management Standards Within 15 Months
 - Detailed Management Standards for Generators, Transporters and Recyclers
 - Significant Restrictions on Lead Levels in Used Oil Burned as Fuel
 - Five Cents Per Quart Fee to Finance State Used Oil Collection Programs

USED OIL

■ Legislative Developments

• Good News/Bad News

- Efforts to Craft Compromise Ongoing
- Haven't Reached an Agreement - Lead Levels the "Sticking Point"
- "No Listing" Mandate and Management Standards Likely to Follow Agreement on Lead
- Full Energy and Commerce Committee Mark-up in Late May or Early June

USED OIL

- Senate Environment and Public Works Committee
Mark-up Scheduled for April 29
 - March 27 Staff Draft Provides for “No Listing”,
Provided Management Standards Are
Complied With
 - Lose Listing Exemption for Violation of
Management Standards?
 - Detailed Used Oil Management Standards
 - Even More Restrictive Lead Levels in Used Oil
Burned as Fuel

United States
Environmental Protection
Agency

Communications, Education,
And Public Affairs
(A-107)



Environmental News

For Release: Monday, May 4, 1992

EPA PRESERVES STATUS QUO ON USED OIL

Robin Woods 202-260-4377

The U.S. Environmental Protection Agency announced today that it will not place used oil destined for disposal on its list of hazardous wastes under the Resource Conservation and Recovery Act (RCRA).

Used oil destined for disposal is already subject to full regulation as a hazardous waste under RCRA and other statutes, if certain contaminants exceed regulatory levels. These levels can be determined through specified testing procedures.

Today's action will not change the current regulatory status of used oil, including recycled used oil. For regulatory purposes, EPA distinguishes between used oil intended for disposal, which can trigger hazardous waste controls, and used oil for recycling, which is currently exempt from most hazardous waste controls.

"An estimated 260 million gallons of used oil -- 24 times the amount in the Exxon Valdez spill -- is dumped down sewers, on land or in waterbodies," said EPA Administrator William K. Reilly. "That has to change -- we're degrading our water resources. And that's why I favor a strong recycling program."

"Because used oil that will be disposed of is already subject to regulation, we see no need for duplication," said Reilly. "At the same time, we must step up consumer education."

EPA is deferring a decision on whether to list recycled used oil as a hazardous waste and which management standards, if any, should apply, until studies currently underway are completed. EPA's goal is to ensure that used oil is managed in an environmentally sound manner throughout the recycling process.

Used oil that is to be recycled by reprocessing into a new product does not have to be tested for hazardous contaminants. Used oil that is recycled by burning for energy recovery, however, must be tested before burning to check for lead,

(more)

R-94

- 2 -

cadmium, chromium, benzene and other constituents to ascertain that it does not exceed federal regulatory limits. EPA has set safety thresholds for these contaminants above which the oil must be burned in regulated burners subject to hazardous waste regulations.

Oil is generally dumped on land or in water when not collected for recycling.

Nearly 1.3 billion gallons of used oil are produced annually, with 770 million gallons collected by recyclers for reprocessing. Approximately 200 million gallons of used oil are produced by individuals who change their own automotive oil, with only 10 percent currently dropped off or collected for recycling.

EPA also will not regulate used oil filters as hazardous waste, so long as all free-flowing oil has been removed from the filter. EPA encourages the recycling of used oil filters.

Today's decision will appear in the Federal Register soon. For more information, the general public can call EPA's waste hotline at 800-424-9346, or 703-920-9810, in the Washington, D. C., area.

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R-94

1992 STATE USED OIL LEGISLATION

<i>Arizona</i>	S.B. 1112	Penalty tax for burning used oil. Passed Senate.
<i>Colorado</i>	H.R. 1231	Used oil provisions in Recovery Product Resource Act.
<i>Hawaii</i>	H.B. 2518	Used oil recycling fund financed by 50 cents per-quart deposit fee beginning July 1, 1992.
<i>Illinois</i>	H.B. 2020	State must use re-refined oil in State vehicles whenever economically feasible. Effective July 1, 1992.
	S.B. 634	Requires counties to implement collection plans for household hazardous wastes, including used oil.
<i>Indiana</i>	S.B. 294	Solid waste districts bill signed into law. = Used oil amendments from H.B. 1033, patterned after Florida law, deleted in conference.
<i>Iowa</i>	HSB 567/ SSB 263	Motor oil retailers must accept used oil from customers at point of sale.
	HF 633	Prohibition on disposal of motor oil filters in landfills. Withdrawn.
	SB 2096	Senate study on establishing preference for State purchase of recycled lubricating and industrial oils.
<i>Kansas</i>	H.B. 2309	Prohibition on used oil reclaiming facilities from constructing, altering or operating without a permit. Killed in committee.
<i>Massachusetts</i>	H.B. 1543/ H.B. 1547/ H.B. 1725	50 cents per-quart deposit on motor oil.
	H.B. 1557	Large generators (> 700 gallons/year) must construct waste oil retention facilities.
	H.B. 4537	7 cents per-quart fee on manufacturers of automotive oils.
	H.B. 3766	Further regulation of waste oil disposal.

<i>Michigan</i>	H.B. 4836	25 percent recycled oil content. Died.
	H.B. 4992	County solid waste plans must include used oil.
	S.B. 275	Prohibition on the disposal of household hazardous wastes, including used oil, in landfills or municipal solid waste incinerators after January 1, 1993.
<i>Minnesota</i>	H.F. 2150	Study of used oil disposal and recycling.
<i>Nebraska</i>	L.B. 592	Prohibits burning of certain solid wastes, including used oil, after January 1, 1993.
<i>New Hampshire</i>	H.B. 263	2 cents per-gallon fee on used oil received at any marketer's facility for processing, blending or sale. Fee deposited in hazardous waste cleanup fund.
	H.B. 1165	State agencies must reuse waste motor oil. Prohibits sale of used motor oil to anyone other than another State agency. Killed.
	H.B. 646	Bill passed by House deleted provision that have prohibited disposal of used oil in landfills. Includes only leaf and yard waste.
<i>New York</i>	A.B. 9703/ S.B. 7128	Defines "retail establishment" in Environment Conservation law as it affects used oil.
	A.B. 5174	Regulates the use of waste oil as fuel.
	S.B. 1763	Limits the use of waste oil in combustion equipment.
	S.B. 4477	Authorizes State Environmental Facilities "Corporation to extend credit for industrial waste oil recovery. Passed Senate .
	A.B. 8327	Identical to S.B. 4477.
<i>North Carolina</i>	S.B. 901	Imposes used oil disposal tax on sale and use of motor oil and similar lubricants.
<i>Oklahoma</i>	S.B. 818	Requires persons transporting >500 gallons/year of used oil or recycling >6,000 gallons/year of used oil to register with Department of Health. Passed Senate.

<i>Pennsylvania</i>	H.B. 2286	Establishes used oil collection and recycling program. Funded by annual transfer of \$500,000 from General Fund.
	H.B. 2287	Requires municipalities to adopt ordinances requiring persons to separate three materials for recycling. Used oil among materials that may be chosen.
	S.B. 849	Provides a manufacturing consumption tax credit to offset loss for purchase of used oil, waste tires paper and plastics.
	H.B. 953	Requires labeling by retailers of household hazardous materials, including motor oils and filters.
<i>Rhode Island</i>	H.B. 5377	Imposes a \$1.50 per-quart tax on engine oil sold and provides for a \$1.25 per-quart rebate when returned.
<i>South Carolina</i>	S.B. 1273/ H.B. 4379	Bill includes a 5 cents per-gallon incentive for retail facilities establishing separate tanks for DIY oil. Also imposes an 8 cents per-gallon fee on retail sale of motor oil, effective 11/1/92.
	H.B. 4346	Excludes fees imposed on sale of motor oil from definition of "gross proceeds" of sales for State's sales and Use tax.
<i>South Dakota</i>	H.B. 1001	Bans disposal of used motor oil and lead acid batteries in landfills. Signed into law.
<i>Tennessee</i>	S.B. 1807/ H.B. 2204	Creates used oil collection fund, financed by a 1 cent per-quart fee on the sale of motor oil. Committed to study for bill introduction in 1993.
	S.B. 967	Bans waste oil from landfills, effective January 1993.
<i>Vermont</i>	H.B. 374	Requires manufacturers to collect waste oil from exempt small quantity generators and households.
	H.B. 826	Retailers selling >1,000 gallons/year of motor oil must provide free used oil collection program. Retailers prohibited from selling until compliance achieved.

<i>Vermont, cont.</i>	S.B. 400	Establishes deposit/return system for used motor oil. Retailers would issue rebate coupon at purchase which would be redeemed upon return of specified quantity of used oil.
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1992 STATE USED OIL REGULATORY ACTIVITY

<i>Arkansas</i>	Department of Pollution Control and Ecology to propose regulations which must be promulgated by December 31, 1992. Regulations to address: collection, storage, disposal, reuse and recycling of used oil. Law also requires motor oil retailers to have available free used oil collection facilities for DIY oil. Draft regulations expected in July.
<i>New York</i>	Department of Environmental Conservation's Bureau of Waste Reduction and Recycling drafting regulations implementing 1991 law. The regulations are expected to address: secondary containment for used oil retention facilities, expansion of regulations to include all retail establishments selling more than 1,000 gallons of motor oil annually. No draft has been issued.
<i>Pennsylvania</i>	Department of Energy developing regulations that would designate oil as hazardous waste.
<i>South Carolina</i>	Department of Health and Environmental Control still developing Solid Waste Management Act of 1991 regulations, including an 8 cents per-gallon fee on motor oil sales. Comment period ended August 31, 1991; no hearings have been held.

1991 USED OIL LAWS

The following States enacted used oil laws in 1991:

Arkansas	Maine	North Carolina
California	Maryland	South Carolina
Hawaii	Minnesota	Texas
Indiana	Montana	Vermont
Iowa	Nevada	Wisconsin
Louisiana	New York	

UNDERGROUND STORAGE TANKS

- * **NO NEW Regulatory CHANGES SINCE FINANCIAL RESPONSIBILITY DEADLINE EXTENSION (12/91)**
- * **UST INITIATIVES LIKELY TO BE INCLUDED IN PRESIDENT'S go-DAY REGULATORY ACTIVITIES**
 - **STREAMLINING UST CORRECTIVE ACTIONS**
 - **LENDER LIABILITY "FIX"**
 - **"OPTION TWO" DEADLINE EXTENSION (FINANCIAL RESPONSIBILITY)**
- * **EPA REPORT TO CONGRESS ON UST COMPLIANCE PROGRESS**
 - **FOCUS ON PETROLEUM MARKETERS**
 - **LEGISLATIVE RECOMMENDATION TO EXEMPT PETROLEUM-CONTAMINATED MEDIA AND DEBRIS FROM RCRA TC**

UNDERGROUND STORAGE TANKS

*** EPA ENFORCEMENT**

- LEAK DETECTION RECORDKEEPING BIGGEST PROBLEM**
- UST OWNERS/OPERATORS FAIL TO LEAK DETECT PIPING**
- LACK OF FINANCIAL RESPONSIBILITY PAPERWORK**

*** STATE UST PROGRAM APPROVALS**

- SIX STATES (MS, NM, GA, VT, NH & MD) HAVE RECEIVED EPA APPROVAL TO SUBSTITUTE STATE UST PROGRAM**
- 43 STATES HAVE ENACTED UST TRUST FUNDS; 29 STATE UST TRUST FUNDS HAVE EPA APPROVAL; 7 FUNDS SUBMITTED TO EPA FOR APPROVAL**

SECTION XI

DEVELOPING A CORPORATE ENVIRONMENTAL

COMPLIANCE PROGRAM FOR SHIPYARDS -

DEVELOPING A CORPORATE ENVIRONMENTAL COMPLIANCE PROGRAM FOR SHIPYARDS

John L. Wittenborn

- I. Content**
- II. Policy**
- III. Organization**
- IV. Communication**
- V. Planning**
- VI. Documentation**

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CHAPTER I

CORPORATE ENVIRONMENTAL POLICY

It is the policy of _____ that our company and its employees will fully comply with the letter and spirit of all applicable laws and regulations relating to the environment. Our company's goals are: (1) to establish and maintain control of company operations to prevent any adverse environmental effects on _____ employees, _____ customers, the general population, or the environment; (2) to support vigorously the reduction of waste disposal and toxic or noxious emissions through material substitution, recovery, recycling and/or beneficial reuse of raw materials and by-products; (3) to promote practices to prevent or minimize both routine and accidental releases of chemicals to the environment; and (4) to implement a dynamic and pro-active community awareness and emergency response program.

At _____ we recognize that environmental compliance is every employee's responsibility. Therefore, it is incumbent upon each employee to be fully knowledgeable of his or her environmental responsibilities and each employee is expected to meet those responsibilities with the highest level of skill and competence.

CHAPTER II

ORGANIZATIONAL STRUCTURE

A. Corporate Personnel Environmental Responsibilities and Duties.

1. President.

Provides overall corporate leadership and policy guidance on all environmental compliance matters; chairs the Environmental Policy Committee; reviews quarterly reports submitted by the environmental department.

2. Executive Vice President.

Responsible for overall facility compliance; provides strategic oversight for ongoing environmental compliance activities; approves budgets, priorities and schedules; chairs the Environmental Compliance Assurance Committee.

3. Vice President Operations.

Provides overall supervision for the Environmental Department; coordinates environmental planning with other operational requirements; reviews proposed budgets, priorities and schedules; ensures adequate staff and management support for Environmental Department activities.

4. Safety Director.

Maintains compliance with OSHA requirements for employee safety and Hazard Communication Program, receives, reviews and files Material Safety Data Sheets and conducts training as required; coordinates with the Environmental Department regarding purchase, storage and utilization of hazardous chemicals; provides liaison to local community emergency services, including fire, police and health services.

5. Senior Operations Analyst

Coordinates with the environmental manager and the Vice President of Operations regarding all new capital expenditures or major facility modifications or equipment repairs or replacement at the facility ensures that planning activities include detailed environmental review for permit compliance and other environmental implications.

6. Purchasing Director

Responsible for the acquisition of materials, including hazardous and toxic chemicals; receives Material Safety Data Sheets from vendors of chemicals; participates in the selection and purchase of terrain competitive services, including waste handling and disposal; responsible for consulting with environmental department on the purchase of materials and services for which environmental regulatory compliance may be an issue.

7. Environmental Manager.

Supervises the Environmental Department and ensures day-to-day compliance with all environmental requirements at the facility responsible for required reporting both within the company and to outside regulatory agencies; conducts or coordinates training for all corporate managers and employees; maintains environmental files and provides overall engineering expertise for environmental compliance.

CORPORATE STRUCTURE

I. POLICY COMMITTEE

Mission: Provide strategic oversight and direction for all environmental compliance activities; establish policy and foster strong environmental ethic throughout the corporation, and ensure that environmental factors are carefully considered in corporate planning.

Membership:

II. COMPLIANCE ASSURANCE COMMITTEE

Mission: Develop policies and procedures to ensure environmental compliance; resolve conflicts and promote a corporate atmosphere conducive to environmental compliance; review and approve environmental compliance projects; identify and establish priorities and schedules; review and approve expenditures and provide guidance to the Environmental manager on an as needed basis.

Membership:

III. ENVIRONMENTAL DEPARTMENT

Mission: The mission of the Environmental Department is to assume daily responsibility for Eagle Ottawa's compliance with environmental regulations. This shall include responsibility for implementation of this compliance program.

Function:

WRITTEN COMPLIANCE IMPLEMENTATION PLAN

1. Prevention of Adverse Environmental Effects

- Review of property acquisitions, contract bid proposals, etc.
- Review of employee job descriptions and training
- Performance of environmental audit
- Review of off-site waste treatment and disposal facilities

2. Regulatory Compliance

- .. Reporting (external)
- Coordination with counsel
- Permit review

3. Waste Minimization

- Inventory of waste streams
- Hierarchy of waste request

DOCUMENTATION

1. Master List of Ongoing Projects

- Priorities
- Milestones
- Contact Person
- Status Report (internal)

2. File Maintenance

- Corporate Files
- Regulatory Files

3. Training Records

PROFILE

JOHN L WITTENBORN

Admitted to Bar: 1974 Indiana Supreme Court; 1974 Ohio Supreme Court; 1975 U.S. Court of Military Appeals; 1980 U.S. Supreme Court, U.S. Claims Court; 1986 District of Columbia. Also admitted U.S. Court of Appeals for the District of Columbia Fourth Circuit, Seventh Circuit and Tenth Circuits.

1974-1983: chief, Environmental Law Section, General Litigation Division, Office of the Judge Advocate General, U.S. Air Force.

1983-1985: Assistant Chief, Environmental Enforcement Section, Land and Natural Resources Division U.S. Department of Justice. (Supervised all federal environmental enforcement litigation in EPA Regions I, II and VI.) .

Present: Partner, Collier, Shannon & Scott.

Education: U.S. Air Force Academy (B.S. 1971 Distinguished Graduate); Indiana University School of Law (J.D. 1974 Cum Laude); George Washington University Law School (LL.M. Environmental Law 1980 with Highest Honors).

Representative Counseling and Litigation Experience

Current:

- Environmental counsel to the Steel Manufacturers Association Specialty Steel Industry of the United States, Leather Industries of America Shipbuilders Council of America Outdoor Power Equipment Institute, Institute of Scrap Recycling Industries, Chemical Specialties Manufacturers Association and other national trade associations on environmental regulatory compliance matters.
- Counsel for corporate defendants and third party defendants in litigation arising under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund").
- Litigation on behalf of several private plaintiffs seeking cost recovery for cleanup actions under CERCLA.

- Contractor or subcontractor to National Shipbuilding Research Program ("NSRP") on environmental projects, including Environmental Bulletin Board, Environmental Compliance Inspection Checklist for Shipyard Facilities, and Environmental Symposium for Shipbuilding and Ship Repair Facilities.
- Counseling and permitting for fifteen national trade associations pursuing group stormwater permits.
- Counseling and litigation in hazardous waste permit, enforcement and corrective action matters regarding cleanup and closure of regulated hazardous and solid waste units.
- Counseling and litigation for numerous corporate clients in regulatory compliance, enforcement actions and permit challenges pertaining to air and water pollution and solid and hazardous waste handling and disposal under the Clean Air Act the Clean Water Act the Resource Conservation and Recovery Act, and equivalent state statutes.
- Counseling and lobbying on major environmental legislation including the Clean Air Act Amendments of 1990, the Water Quality Act of 1987, Superfund Amendments and Reauthorization Act and Resource Conservation and Recovery Act.
- Counseling on environmental audits, property transactions and site investigations.
- Litigation of regulatory challenges and petitions for review of major EPA regulations including municipal solid waste and land disposal restrictions.
- Counsel to the United States Air Force on environmental legislation, stormwater permitting and National Environmental Policy Act matters.
- Counsel to Nebraska Department of Environmental Control on environmental issues affecting the siting, licensing, construction and operation of a low level radioactive waste disposal facility.

Current Professional Activities

- Counsel to National Hazardous Waste Federation
- American Bar Association
Section on Environmental and Natural Resource Law
- Contributing Editor, Community Right to Know News
Thompson Publishing Company
- Counsel to the Chrome Coalition
- Lieutenant Colonel, United States Air Force Reserve
- Author, "Environmental Law and Litigation" Coursebook for
Air Force Judge Advocate Environmental Law Course (1983-
1986)
- Author, "Liability for Hazardous Wastes Produced During the
Course of Ship Repair"; Journal of Ship Production, August
1990

JEFFREY L. LEITER

Jeffrey L Leiter is a partner in the Washington D.C. law firm of Collier, Shannon & Scott. He is active in the firm's environmental and energy practice.

Leiter is a nationally-recognized legal expert on underground and above-ground storage tank issues. He is editor-in-chief of *The Underground Storage Tank Guide* and *The Aboveground Storage Tank Guide* both published by The Thompson Publishing Group. biter regularly counsels the firm's clients on the range of tank issues , ranging from regulatory compliance, insurance matters, and property transfers to leak cleanups.

In addition, Leiter assists the firm's clients on other environmental and health and safety matters including storm water permitting. He is supervising eight group storm water applications submitted to the U.S. Environmental Protection Agency.

He is a graduate of the George Washington University and received his law degree from the Catholic University's Columbus School of Law. Leiter and his Wife, Lisa, reside in Vienna, Virginia. His golf handicap is 15.

ROBIN A. FASTENAU
COLLIER, SHANNON & SCOTT
(202) 342-8805

Robin Fastenau is an associate in the Washington D.C. law firm of Collier, Shannon & Scott She specializes in private litigation under the Comprehensive Environmental Response, Compensation and Liability Act, and represents a number of clients seeking recovery of response costs from other potentially responsible parties. Ms Fastenau also defends clients in enforcement actions brought by government agencies under various environmental statutes. Ms Fastenau is also involved in counseling clients on how to obtain compliance with applicable statutes, including the Resource Conservation and Recovery Act, the Clean Water Act, and the Comprehensive Environmental Response, Compensation and Liability Act. Ms. Fastenau is a member of the American Bar Association's Section of Natural Resources, Energy, and Environmental Law, and a member of the District of Columbia, Virginia, and Pennsylvania bar associations. Ms. Fastenau is a 1984 graduate of the Georgetown University law Center.

WILLIAM MOULTRIE GUERRY, JR.
COLLIER, SHANNON & SCOTT
3050 K STREET, N.W.
WASHINGTON, D.C. 20007

EXPERIENCE

1987- Present Environmental Associate, Collier, Shannon & Scott, Washington D.C.

Representative experience:

RESOURCE CONSERVATION AND RECOVERY ACT (RCRA)

Representation of industry trade associations in numerous proposed EPA rulemakings and in federal appellate cases regarding the land disposal regulations ("LDRs") applicable to electric arc furnace dust (K061), land applied byproducts derived from recycled K061, and "characteristic" hazardous wastes.

1 Counsel to numerous steel manufacturing companies and hazardous waste recyclers on various compliance issues associated with generating, treating recycling and disposing of hazardous wastes and remediating contaminated soil that is subject to corrective action.

Providing strategic counsel and legal opinions for a national shipbuilding trade association and a used oil recycling company on regulations and potential liability associated with the removal of hazardous waste, and oily bilge waters from ships and barges.

Creating and providing strategic counsel to a coalition of steel manufacturers responding to a "cluster" enforcement action concerning the export of K061. Negotiating with EPA to adopt a standard bilingual waste export notification- document.

1 Preparation of strategic documents, position papers, and written testimony in response to waste export and RCRA reauthorization legislation.

1 Serving as general counsel and board member of Clean Soil, Inc. A start-up company with promising innovative technology to clean contaminated soil.

CLEAN AIR ACT

1 Successfully developed and implemented a legislative strategy resulting in the adoption of a pollutant delisting amendment in the section of the 1990 Clean Air Act Amendments ("CAA") governing hazardous air pollutants.

1 Representing several industry trade associations to persuade EPA to adopt cost effective regulations that implement the titles of the CAAA governing permits, toxic air pollutants and ozone non-attainment with regard to both stationary and mobile sources.

1 Primary speaker at several large educational conferences on the implementation of the CAAA

Overseeing consultants sample and model emissions of regulated air pollutants from a steel manufacturing plant.

Counsel to manufacturers in Wisconsin and Maryland on state regulations and permit requirements applicable to toxic air pollutants and volatile organic compounds ("VOCs").

- Counsel to several trade associations in federal appellate litigation challenging state implementation plans ("SIPs") imposing stage two vapor controls.

CLEAN WATER ACT

Representation of industry intervenors in federal appellate litigation supporting EPA's extension of the storm water permit application deadlines. Preparation of several part one group storm water permit applications.

- Preparation of comments and legislative strategy for a leather tanning trade association regarding the pre-treatment and discharge of industrial wastewaters to publicly owned treatment works ("POTWs") and the management of sewage sludge. Also prepared contracts, permit appeals and petitions for rulemakings on related issues for individual leather tanning companies.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION & LIABILITY ACT (CERCLA}

- Counsel to various manufacturers on numerous regulatory issues associated with the remediation of hazardous wastes and contaminated soil at CERCLA sites.

Counsel to manufacturers on mitigating potential CERCLA liability, including drafting and negotiating contractual language.

1986-1987

Law Clerk, Justice Charles S. Russell, Supreme Court of Virginia,
Richmond Virginia

PUBLICATIONS

Co-author *Liability for Hazardous Wastes Produced During the Course of Ship Repair*, VOL 6 of *J. of Ship Production* 175 (1990).

EDUCATION

University of Virginia (J.D., 1986)
Cambridge University, Wolfson College (1982-1983)
University of Virginia (B.A *magna cum laude*, 1983)

BAR ADMISSION

American Bar Association
The District of Columbia Bar
The Virginia State Bar

CAROLYN ODESSA TILLMAN, born Richmond Virginia October 28, 1957 admitted to bar, 1985, Virginia; 1988, District of Columbia; 1991, U.S. District Court for the Eastern District of Virginia. Education: University of Virginia (B.A., High Distinction, 1980); University of Virginia (J.D, 1984). Employment: Attorney Advisor, U.S. Environmental Protection Agency (Office of Enforcement and Compliance Monitoring), 1984-1988; Attorney, American Telephone & Telegraph Company (Environmental section, Litigation Division), 1988-1990. Member Virginia State Bar; District of Columbia Bar; American Bar Association (Section on Natural Resources and Environmental Law), National Bar Association (Women Lawyers Division Greater Washington Area Chapter).

ANDREA B. WENDEROTH, born New York New York, September 12 1961; admitted to bar, 1989, Connecticut Preparatory education University of California Santa Cruz (B.A, 1984); legal education Pace University (J.D 1989). Editor-in-Chief, 1988-1989, Pace University Environmental Law Review. Member: Connecticut State Bar; American Bar Association (Section of Resources, Energy, and Environmental Law).

PROFILE

STEVEN N. KOURTIS

Born. Sydney, N.S.W., Australia, December 6, 1961
1991 -Present Associate, Collier, Shannon & Scott
1988-1991: Law Clerk, Collier, Shannon & Scott
Education: Duquesne University (B.A 1984); Columbus School of Law, Catholic University of America (J.D. 1991).

Federal Underground Storage Tank Regulations

Providing counseling on all aspects of the Federal underground storage tank ("UST") regulations.

Advised independent gasoline marketers on their -UST financial responsibility requirements.

Prepared UST regulatory history.

Member of the National Association of Corrosion Engineers Task Group T-10-3: Joint Steering Committee on Corrosion Control on Underground Tank Storage Systems.

Contributor to The *Underground Storage Tank Guide* (2 volumes) and The *Aboveground Storage Tank Guide*, both published by the Thompson Publishing Group. Both publications include a monthly newsletter and update service for subscribers.

Massachusetts Underground Storage Tank Experience

Prepared summary of Massachusetts Underground Storage Tank Petroleum Product Cleanup Fund

Prepared summary of overall Massachusetts UST program

Other States Underground Storage Tank Experience

Compiled library of UST legislation statutes regulations, and other related materials for all 50 States and six Territories.

Prepared summaries of State UST trust fund laws.

Prepared summaries of UST programs for all 50 states.

Prepared memoranda advising client in the closure of an abandoned UST in Pennsylvania.

Prepared memoranda advising client in the closure and removal of two above-ground storage tanks located in Pennsylvania

Practical Experience

Attended UST removal and replacements at retail gasoline outlets.

Compiled list of every Federal and State court case concerning USTs.

Experience in Analyzing Regulations

Prepared memoranda on every Federal UST regulation promulgated by the U.S. Environmental Protection Agency ("EPA") since 1988.

Revised petroleum marketing client's written Hazard communication Standard ("HCS") program under the Occupational Safety and Health Administration's ("OSHA") regulations (*29 C.F.R 1910.1200*).

Additional copies of this report can be obtained from the National Shipbuilding Research Program Coordinator of the Bibliography of Publications and Microfiche Index. You can call or write to the address or phone number listed below.

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